CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 5, 1930
CERTIORARI GRANTED MAY 13, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings in Court of Appeals of District of Columbia	1	1
Caption [omitted in printing]	1	1
Record from Supreme Court of District of Columbia	1	1
Caption [omitted in printing]	1	1
Petition for writ of mandamus	1	1
Exhibit "A," decision of Department of Interior	8	6
Exhibit "B," opinion on motion for rehearing	22	18
Rule to show cause and marshal's return	36	29
Response to rule to show cause	37	30
Order discharging rule and dismissing petition	38	31
Note of appeal	39	31
Memorandum re bond	39	32
Stipulation re substitution	39	32
Assignments of error	40	32
Designation of record	41	33
Clerk's certificate [omitted in printing]	41	34
Argument and submission [omitted in printing]	43	34
Opinion, Van Orsdel, J.	44	34
Judgment	62	43
Designation of record	63	44
Clerk's certificate [omitted in printing]	65	44
Order allowing certiorari	66	44

1 [Captions omitted.]

In Supreme Court of the District of Columbia

At Law. No. 75165

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC, PLAINTIFF

VS.

HUBERT WORK, AS SECRETARY OF THE INTERIOR, DEFENDANT

Petition for writ of mandamus

Comes now the above-named plaintiff, and, as ground for his petition for mandamus, alleges:

2 1. That the plaintiff is a citizen of the United States and a citizen of and resident of the State of California; that at all times herein mentioned he was upwards of twenty-one years of age and was and still is qualified in all respects to locate and otherwise acquire, own, and patent placer mining claims, situate on the public mineral domain of the United States, pursuant to law in relation thereto; that he brings this suit in his own right and not otherwise.

2. That the said defendant is the duly appointed, qualified, and acting Secretary of the Interior, and temporarily a resident of the District of Columbia, and is sued herein in his official and representative capacity and not otherwise.

3. That on the 1st day of October, 1919, this petitioner and seven other citizens of the United States, each qualified under the law in relation thereto to locate placer mining claims, located the north half of the north half of section twelve in township five south, of range ninety-six west of the sixth principal meridian, in Garfield County, State of Colorado, as the Spad No. 3 placer claim; that at the time of such location the said land was a part of the public lands of the United States subject to appropriation under the mining laws of the United States for the valuable deposits of oil shale therein and not otherwise appropriated or reserved under the law of the United States.

4. That the said Spad No. 3 placer claim was one of a group of six oil-shale placer claims known, respectively, as Spad placer claims Nos. 1 to 6, inclusive, all of which were adjacent to each other and all of which had been located by and were owned by the same persons during the assessment year 1920.

5. That this plaintiff and his colocators of said placer claims performed, whether required by law or not after the passage of the act of February 25, 1920 (41 Stat. 437), the annual labor for the assessment year 1920, ending July 1, 1921, on the claims numbered 4, 5,

and 6, intending that said work was for the entire group of six claims and that the total value of the said annual labor so performed in said assessment year 1920 for said group of claims was more than six hundred dollars. The Secretary of the Interior, in his decision of February 8, 1928, on motion for rehearing, found:

3 "With respect to the contention renewed on rehearing that mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it suffices, it is needful only to say that this contention was given full consideration when the decision was rendered, and it is not considered to be law nor in harmony with the decisions of the department or the courts. The department found that these cuts were not made with any intent that they were to be a part of a general scheme of development of the claims as a group, and sees no reason to disturb that finding. The question of the applicability of the work as common improvement must be determined from the particular facts and circumstances in each case. The supplemental affidavit filed on rehearing to the general effect that a custom existed in the shale regions to perform such work by putting in open cuts on one or more of the claims of a group at an expense equal to $100 for each claim when prorated, is immaterial. No such custom, should it exist, will be permitted to override the requirements of law. Putting this so-called group work out of view as of no avail, attention will be given to the larger questions raised in the brief."

6. That this plaintiff acquired the interest of his colocators in said Spad No. 3 placer claim and during the assessment year 1921, ending July 1, 1922, performed labor and made improvements on said Spad No. 3 placer claim of the value of more than one hundred dollars.

7. That thereafter and during the assessment year 1922, ending July 1, 1923, this petitioner performed labor and made improvements on the said Spad No. 3 placer claim of the value of more than one hundred dollars.

8. That this plaintiff continued to perform labor and to make improvements on the said Spad No. 3 placer claim until the aggregate value of such labor performed and improvements made exceeded the sum of five hundred dollars, and thereupon and on the 25th day of September, 1922, in the United States district land office at Glenwood Springs, Colorado, in which district the said land was then located, applied for patent on the said Spad No. 3 placer claim under the provisions of section 2325, Revised Statutes, and

4 thereafter complied with all requirements of law as to posting and publication of notice and all other requirements for obtaining patent to the said Spad No. 3 placer claim, and on Decem-

ber 16, 1922, paid to the receiver of said land office the purchase price fixed by law for the land covered by the said claim, to wit, the sum of four hundred dollars; and obtained final receiver's receipt therefor, dated December 16, 1922.

9. That at no time after the location of said claim, as above alleged, was there ever any attempted location of said land or any part thereof by any other person; and that at the time of the said application for patent and the said payment there were no claims or rights of any third party to any part of the said land covered by the said placer claim and that no contest, suit or legal action of any kind whatsoever had ever been instituted by the United States or by anyone whomsoever to question the ownership of the said claim by this plaintiff or his colocators or any of them; and that at the time of the said patent application and of the said payment the said land was a part of the public domain of the United States, and was not otherwise appropriated or reserved under the laws of the United States, except that between the time of the location of the said claim and the application for patent thereon, the so-called leasing act, approved February 25, 1920 (41 Stat. 437), had been adopted; but that the said Spad No. 3 placer mining claim was a valid claim existent at the date of the passage of the said act.

10. That after the said payment by the plaintiff for said claim, contest proceedings were instituted in the said Glenwood Springs, Colorado, District Land Office, in which district the said lands covered by the said claim were then situate, against the said claim; that said contest was initiated by the officers of the Department of the Interior and a hearing thereon was had before the register of the said Glenwood Springs District Land Office.

11. That in the said hearing all the charges against said claim were either withdrawn or else dismissed by the said register except a charge founded on the alleged insufficiency of the annual labor for the assessment year 1920.

12. That the record of the proceedings in said hearing was certified to the General Land Office, and the Commissioner of the General Land Office held the claim to be null and void for the alleged insufficiency of the annual labor for the assessment year 1920.

13. That this plaintiff appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and by departmental decision dated October 3, 1927, copy of said decision is hereto attached, marked Exhibit "A," and made a part hereof, the department held that all the charges made against the claim were properly withdrawn or dismissed by the register of the Glenwood Springs land office except the charge concerning the alleged

insufficiency of the annual labor for the assessment year 1920, which last-mentioned charge was found to be sustained.

14. That thereafter this plaintiff applied for a rehearing, which was allowed, and decision on the rehearing was dated February 8, 1928.

15. That in this decision of February 8, 1928, the Secretary of the Interior expressly found:

"The sufficiency of the exposures of oil shale on the claim to constitute a valid discovery is not questioned. The claim appears to have been a valid claim existent on February 25, 1920, the date upon which the act became effective, but it is admitted by claimant that no work or improvements, as required by section 2324, was performed on the claim on or before July 1, 1921, to which date Congress, by the act of December 31, 1920 (41 Stat. 1084), extended the time for doing the annual assessment work for the calendar year 1920. Subsequently the present claimant acquired the title of the other locators of this claim, and annual assessment work was performed for 1921, 1922, and to the time of the institution of this inquiry, which work exceeds in value the sum of $500 required by law to be done as a prerequisite to the grant of a patent." Copy of said decision is attached hereto, marked Exhibit "B," and made a part hereof.

16. That in spite of said finding above set out the Secretary of the Interior held the said patent application for rejection and declared the said claim to be null and void.

17. That thereafter this plaintiff applied to the Secretary of the Interior to exercise his supervisory power and reopen the case, but this was denied by the Secretary of the Interior.

6 18. That the Secretary of the Interior, in and by the said decision of February 8, 1928, affirmatively found as aforesaid that the said claim was a valid claim existent at the date of the passage of the leasing act of February 25, 1920 (41 Stat. 437); that during the assessment years 1921 and 1922 this plaintiff performed the annual labor required by law on the said claim; that the plaintiff continued to perform such annual labor until a total of more than $500 in value of labor had been performed and improvements made upon the claim, whereupon patent application was filed; yet the Secretary of the Interior held the claim for rejection on the theory that the alleged nonperformance of annual labor during the assessment year 1920 was fatal to the claim.

19. That a failure, if any, to perform annual labor during the assessment year 1920 was followed by the performance of annual

labor during the assessment year 1921; that the rights of no third party had attached to the land by location, lease application, or otherwise, and that no action had been then taken by the United States to cancel the claim, no such action having been taken until long after the annual labor for the assessment year 1921 and subsequent years had been performed.

20. Wherefore plaintiff contends that, because of the matters herein alleged, there was nothing left for the Secretary of the Interior to do except the purely ministerial act of issuing patent for the said placer claim; but the Secretary of the Interior had refused to issue the same.

21. That the plaintiff has fully exhausted the procedure of the Department of the Interior in the establishment of his rights and has no further or adequate remedy or procedure therein.

22. That on March 7, 1928, this plaintiff received through the mail from the register of the Denver, Colorado, district land office, in which land district the said lands are now situate, a check for $400.00 as a return of the purchase price of said lands; that this plaintiff immediately caused said check to be tendered back to the said register, who refused to accept the same, on the ground that the case had been fully closed.

23. That the plaintiff holds the said check for $400.00 ready
7 for return and surrender to the register of the land office in which the said lands are situate, and is ready, able, and willing, by the return of said check or otherwise, to pay the purchase price of the said lands.

Wherefore, plaintiff prays that this honorable court will issue an order requiring the defendant to show cause, within such reasonable time as the court may deem proper, why a writ of mandamus should not issue herein; that this court will adjudge that the petitioner is entitled to a patent in fee simple to the said Spad No. 3 placer mining claim and will issue its writ of mandamus, commanding said Secretary of the Interior (defendant herein) to make, execute, and deliver to said plaintiff patent in fee simple to the following described land situate in Garfield County, Colorado, to wit:

. N½ N½ sec. 12, T. 5 S., R. 96 W., of the 6th P. M., and for such other judgment or order as may be proper, and for costs.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER B. NYCE,
Attorneys for Plaintiffs.

[*Duly sworn to by Emil Krushnic; jurat omitted in printing.*]

8 *Exhibit "A" to petition*

Department of the Interior, Washington

A. 10053. Emil L. Krushnic

"N." Glenwood Springs 022364. Placer location held null and void and application for patent therefor rejected. Affirmed

Appeal from the General Land Office

This is an appeal by Emil L. Krushnic from a decision of the Commissioner of the General Land Office of October 5, 1923, adjud'ing the Spad No. 3 oil shale placer claim, covering the N. ½ N. ½ sec. 12, T. 5 S., R. 96 W., 6th P. M., Glenwood Springs Land District, Colorado, null and void, and holding his application 022364 for patent to the same for rejection. On December 15, 1923, adverse proceedings were directed against the location upon three charges. Charges 1 and 2, in effect, allege that the location was fraudulent and made in bad faith, in that Krushnic and Chris C. Dore made the location for their sole benefit by resorting to the device of using the name of six persons in the location of the claim who were without interest therein for the purpose of obtaining more land than could be embraced in a location made by two locators. Charge 3 alleged that the claimants were not, on February 25, 1920, in diligent prosecution of work looking to discovery of mineral. It appears from the record that subsequently the attention of the commissioner was invited to the first report made upon the claim by a field inspector containing a recommendation that a charge be preferred that no annual assessment work for 1920 had been performed upon the claim, whereupon, on February 6, 1925, the charges were amended to include charge 4 which reads: "That for the year 1920, as extended by the act of December 31, 1920 (41 Stat. 1084), to July 1, 1921, neither the applicant nor his predecessors in interest performed any assessment work to the value of at least $100, tending to develop the claims."

9 The applicant denied the charges and upon issues joined a hearing was duly had between the parties, resulting in a record of proceedings of some 900 pages.

This record appears to require the comment that it is unduly burdened with unnecessary [illegible]nts upon the materiality of testimony and with other disc[illegible] and with much testimony so inconsequential or so remote [illegible]elating to the issues that it could

properly have been suppressed by the register under rule 38 of the Practice as obviously irrelevant.

At the close of the Government's case the register sustained the demurrers of the defendants to the sufficiency of the evidence to sustain charges 1, 2, and 3, and overruled his demurrer to charge 4. Charges 1 and 2 were not only not proven but refuted by the testimony of the locators of the claims. Charge 3, in the absence of an averment of lack of discovery of mineral and made where discovery was not questioned, was clearly inapplicable and invalid. Furthermore, no evidence was offered to support it. The Government discharged the initial burden upon it by establishing prima facie that no annual assessment work was performed upon the claim for 1920 within the period required and went further in anticipation of the defense and offered evidence tending to show that the work outside the claim declared to have been done for its benefit as one of a group was not done for that purpose or had a tendency to benefit the claim as one of a group. The action upon the demurrers was correct.

The defendant assails the sufficiency of charge 4 as a valid charge in his brief and oral argument before the department, and contends that the Government is not by the leasing act (act of February 25, 1920) invested with the character of an adverse claimant; that no annual assessment work has been required to maintain claims theretofore initiated and existent at the date of the passage of said act; that the claim does not become ipso facto void upon default in the performance of assessment work, but it would be necessary, to effect such a forfeiture, to assert and establish the same in an independent tribunal. The defendant points to the familiar provision of the mining law that as to land subject to relocation by another upon default of the prior locator in the performance of annual assessment work, the forfeiture is not consummated until some one else enters with the intent to appropriate the property under the mining laws.

From this it is argued that it is th' entry by another that gives notice to a defaulting claimant that he will have to defend against forfeiture, and from this it is contended, in effect, that some physical reentry or affirmative action against the claim must be taken by the Government to terminate a defaulting claimant's rights, and if prior thereto, he resumes his work on the claim, he cures the default. The argument proceeds to state:

Even if the effect of the leasing act could be said to be to invest with the character of public land withdrawn from entry any claims existing at the time of the passage of the act and thereafter abandoned, surely it can not be claimed that the effect of the act is such as to work the forfeiture ipso facto of a claim for which assessment work has been done in any year after the passage of the leasing act

which assessment work might in the opinion of some field inspector of the Government be insufficient to meet the $100.00 requirement of the statute, and, ipso facto, without any overt act on its part whatsoever, to constitute a fictional entry upon the claim by the Government. If such could be the case, the original claimant, never having intended to abandon, would have no notice that there had been a claimed forfeiture as he would in the case of the required actual entry upon the claim by any true adverse claimant. He might continue to do his assessment work in good faith year after year and expend hundreds of dollars upon his claim, as was done in this case. The moment when he would first be apprised that there had been a claimed forfeiture in a prior year based upon the alleged insufficiency of the assessment work done in that year would be at the time of his application for patent.

The contention is not supported by any authority in point nor can the reasoning be accepted as sound.

Charge 4 is founded upon the doctrine that in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a
11 certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the leasing act. Cronberg *v.* Hazlett (51 L. D. 101); Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262). Section 37 of the leasing act was in effect a withdrawal of lands containing oil shale and the other minerals specified therein from location and entry under the general mining laws and for a public purpose. It forbids the perfection of any such location or entry except valid claims existent at the date of its passage and thereafter maintained in compliance with the laws under which initiated, and prescribes that the deposits named therein shall be disposed of only in the manner provided in the act, except claims existing and maintained as above stated. The act had for one of its objects the raising of additional public revenue, evidenced by changing the method of disposition of such deposits from a free grant thereof under valid possessory rights or by the conveyance for a nominal sum of absolute title to the ground claimed, a system of leasing in which rents and royalties are exacted from the lessee. In a recent decision (United States *v.* Lewis G. Norton), decided by the Court of Appeals for the fifth circuit, June 9, 1927, the court said of a withdrawal of a tract under section 2380 for the purpose of survey and sale as town lots: "It is quite apparent that a statute providing for so changing the existing methods of disposing of public lands as to effect an in-

crease of the Government's revenue is one for a public purpose, and the public land reserved pursuant to such a statute is reserved for a public purpose."

Section 37 of the leasing act affords notice to all persons interested in mineral locations containing the minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from its operation. There is no warrant for reading into its saving clauses the statutory provision as to resumption of work of the original locator before hostile entry by another. This seems clear when such provision is considered in connection with its context. Section 2324, Revised Statutes, after prescribing the requirement of annual assessment work, provides:

12 "* * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It is plain that the provision relating to the resumption of work is a restriction imposed upon the right of relocation. It applies only to claims that could be relocated but for the resumption of work. It has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose. The defaulting claimant can not restore a lost estate in such lands by resuming annual labor and improvements at a later time.

There is no question as to the jurisdiction of the department to determine whether mining claims for which no patent has been sought are valid or invalid, and so declare. That has been so held in a number of decisions by the department, which have received the sanction of the Supreme Court. (Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 223, 234; Cameron v. United States 252 U. S. 450, 463.)

It follows from what has been said that if the mineral claimants of this location failed to perform the annual work and improvements prescribed by section 2324 upon the claim their rights under the location upon such failure terminated.

The Government's evidence that no work was done or improvements made for the year 1920 within the boundaries of the Spad No. 3 is not controverted by the defendant, but he relies upon the labor and improvements made in that year upon Spad claims 4, 5, and 6, composing part of a group of six contiguous claims named Spads 1 to 6, as expenditure intended to aid in the development, and redounding to the benefit of Spad 3 claim and others of the group.

On this situation the Government is discharged from its original burden of providing the default, and it becomes incumbent upon the defendant to establish that the work done or improve-
13 ments made do as a matter of fact, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement. Dolles v. Hamburg Consolidated Mines Co. (23 L. D. 267, 274); Copper Clance Lode (29 L. D. 542, 549); Hall v. Kearney (Colo.) (33 Pac. 373); Copper Mountain Mining & Smelting Co. v. Butte Corbin Consolidated Copper & Silver Mining Co. (Mont.) (104 Pac. 540, 542); Lindley on Mines (sec. 631).

The record shows that Chris C. Dere located for himself and associates the Spad group, 1 to 6, in 1919. These claims constitute one contiguous group in the form of a rectangle, covering all of sec. 12 and the S. ½ of sec. 1, each claim a quarter mile wide and a mile long, running in their numerical order from north to south on the slope of a mountain.

Spad 6 is the lowest stratigraphically and topogrophically, and upon its eastern portion, in a V-shaped escarpment with its apex pointing northwordly, the Mahogany series of oil shales, considered the thickest and richest of the Green River formation, outcrop extensively, and are believed by geol'gists to underlie the other claims of the group. Davis Gulch, a tributary of Parachute Creek, traverses the claims in a southeasterly direction. The dip of the shale beds, variously stated to be from 2 to 4 degrees, is in the direction of the drainage. In the fall of 1920 three cuts were made, the first in the Mahogany oil shale in the escarpment facing southerly, about 200 feet west of the east boundary of and upon Spad 6, and about 2,900 feet from the south line of Spad 3 claim; the second in a fair grade of oil shale west of the center and near the north boundary of Spad 5, and on the west side of Davis Gulch, about 1,500 feet from Spad 3; and the third, a hole in broken sandstone, about 750 feet from Spad 3 and on east side of Davis Gulch and the easterly portion of Spad 4, which defendant witnesses state exposes in the left half corner of the hole a bed of oil shale a few inches in thickness. It appears that Spad 5 covers identically the same ground as Hoffman 5 placer, and Spad 6 is similarly covered by Hoffman 2 placer; that the Hoffman are the earlier locations, and the Sapds 5 and 6 were located in ignorance of such prior locations; and that thereafter the Co-
lumbia Oil Shale and Refining Compnay, who are parties in
14 interest in the claim here in controversy, acquired title to the said Hoffman claims and obtained patent to both on the earlier title, without claiming credit for the improvements here in question. The issues presented by the testimony are, first, whether these three

cuts outside the Spad 3 were made for and tend to develop that claim and others of this group, and, second, if the first question is resolved in the affirmative, whether the reasonable value of such cuts collectively is sufficient when prorated among the six claims of the group to satisfy the requirement of $100 worth of work for the Spad 3 claim. If the work is not a part of a general plan having in view the general development of the group, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then, no matter what the value of it is, it cannot be said to be done in the development of the group. Copper Mountain Mining & Smelting Co. v. Butte Corbin Consolidated Copper & Silver Mining Co., supra.

The cut in the Mahog*nay* ledge on Spad 6 is described as an irregular, wedge-shaped hole, admittedly difficult to measure and ascertain the size, having but three faces, and made by blasting the face of the cliff. Inspector Kintz, who measured it, estimated the cubic yardage of rock removed as between 30 and 60, and Mr. Goodale, engineer for the claimants, who likewise measured it, placed it at 88 cubic yards. Inspectors Berry and Stull, witnesses for the Government, from observing it, estimated it 45 and 50 cubic yards, respectively. The hole is placed at the sandstone marker at the top of the Mahogany shales, and Kintz, who is the only witness who testified as to this matter, stated it was about 200 feet to a safe landing place below. The men who dug this cut both testified, Dore for the defendant and C. R. Pratt for the Government. Their testimony can not be reconciled, and the testimony of both betrays many inconsistencies and inaccuracies developed on cross-examination, but they agree that they took advantage of a crack in the rock parallel with the cliff to place a charge of powder, Pratt saying that it took 1½ cans and Dore 6 cans of black powder, and the hole was blown out with a single blast. According to Dere, further work followed, squaring up the hole and mucking, consuming in all, according to Pratt, 5 to 8 days, and, according to Dere, 10 days. As to the purpose of this hole, Dere testified:

"Well, I figured that I was doing the work generally as has been done in that country, making open cuts and tunnels to benefit those claims to develop them at a later date"; that Mr. Pratt and he started opening up a tunnel on Spad 6; that the work consisted "of an open cut and getting ready for a tunnel for the benefit of the Spad claims—the group." * * * "I wanted to open up this rich Mahogany with a tunnel, and I figured the next year that I would keep working for the benefit of these claims, tunnelling it, because it was about on the face of Spad 6 claim, and it was a good place to dump the shale for retorting and operating."

He was asked, "What did you know about tunnels?" He answered, "Well, in 1919, I seen some tunnels built up at the head of east Middle Creek made by Joe Bellis." Question: "Had those been built for groups of claims up there?" Answer: "Yes, sir."

On cross-examination Dere stated that he is not an engineer, and in reply to further question as to his intent stated: "Well, I figuring on driving the tunnel on Spad 6 for the development of all of them because it was the most practical claim to work from, and it was down below the cliff, and I didn't have to move the retort up on top of the hill to work those other claims." He further stated that he had dug over 500 assessment holes, any one of which could have been turned into tunnels by open cuts, but he did not think that there were any (turned into tunnels).

Goodale, the engineer in charge of the assessment work from 1921 on, testified that he first knew of the hole on Spad 6 in 1922; that Dere had talked with him about tunnels, but he had no recollection of Dere mentioning this hole as intended for a tunnel until "lately"; that Dere mentioned the hole to him as one made for the Spad group, but it did not interest him, and he did not go to look at it at the time, because it was a difficult place to get to and his company had title then to the Hoffman location; that it was not represented as an improvement in the application for patent to the Hoffman 2 claim. Pratt's testimony is silent as to whether such was the intent in excavating this hole.

As to the hole on Spad 5, it appears there is a cabin on that
16 claim. Fred Dere's testimony is to the effect that he was told by his brother Chris to go up and dig a certain sized hole 500 feet from this cabin, and to stay up there a couple of weeks; that he dug a hole in black shale about 500 feet from the cabin, 10 by 12 by 18 feet, but did not know in what direction it was from the cabin. He identified a check for $320 issued October 11, 1920, by Chris Dere to their father as one covering full payment for his labor for 14 days at the rate of $6.00 a day, not including board and lodging. It appears from the testimony of Chris Dere that he did not know where this hole was located, and inquired for the information from his brother Fred in the following year in order to point it out to Mr. Goodale. Two engineers for the defendant and one inspector for the Government agree that the size of the hole is 38 cubic yards.

As to the hole on Spad 4, Pratt insists that he spotted the place for this hole and dug it along. Dere states it was dug by them jointly and under his direction; that all the holes were dug for the benefit of the group; that snow was on the ground when he dug this hole, and he could not see when he got into it, but that he thought he was getting into good shale, but it appeared to be a sandstone for-

mation. Pratt stated he worked 8 or 9 days on this hole. Dere states that it took them about 10 days to complete it. Inspectors Kintz and Stull, who measured this hole, state the cubic yardage is 43 and 49.4, respectively. Engineers Savage and Goodale, who also measured it, got results of 53 and 56 cubic yards, respectively.

There is a large volume of opinion evidence in the record upon both sides relative to probable methods of mining shale from these claims, and whether these cuts could or would be used in any general system adopted for mining the shale as a group, and also whether they actually serve any purpose in prospecting or developing the Spad 3 claim. These opinions can not be reconciled. There appears to be a prevailing opinion, however, among those who testified that there is no agreement among engineers as to what mining method will be adopted. Several of the engineers who testified for defendant were of the opinion that the cut on Spad 6 in the Mahogany shale might be used as the portal of a tunnel, and the cut on 4 in the sinking of an air shaft to intersect the tunnel, and the cuts on 5
17 as an air shaft to intersect a crosscut or drift from the tunnel, or that each cut might or could be used as the portal of a tunnel to mine the shales about it.

Engineer Hurlburt, who so testified, admitted that he would not consider an open cut as a tunnel, and would not lay out an air shaft before he started his tunnel, but would wait until the necessity for the same arose, and would want the tunnel to be some distance in; that he would not consider the cut on Spad 4 for an air shaft at the present time; that he meant "at this stage of the oil-shale game he would not formulate any plan to operate oil-shale mines"; that the cuts on 4 and 5 would supply information as to same strata of shale for a considerable distance on adjoining ground. Engineer Savage, who testified to the same effect, on cross-examination stated that he did not know whether he would give any consideration to a 1920 cut as an air shaft until after his tunnel construction was under way. When asked whether he would tunnel northerly from a point close to the east line of the Hoffman 2, replied that one system of laying out a mining proposition is probably just as good as another; that it is entirely a matter of opinion; that he would not consider the location of an air shaft before he started to drive a tunnel, and if he were doing it himself he would probably do it quite differently.

Engineer Carroll was of the opinion that the cuts could be used as level spaces for core drilling, which he thought necessary in development; that he did not know whether the cuts could fit in with a scheme of mining that he would design; that the hole on Spad 6 might be the logical place for a tunnel and it might not be, but he

would not consider the use of this work unsound engineering from "information we have at this time"; that the scheme of development that he had recommended would involve a cost of $27,000 per acre, and the small value of a particular open cut would not have any effect on the utilization of it in such an expenditure. Goodale's testimony was to the effect that it was possible, and not impracticable, to use the cut on Spad 6 as a tunnel and the other cuts as air shafts, but stated that it would be necessary to go down on it to
18 widen it for a portal; that considerations of haulage and drainage and space for dumping and retorting purposes favored the location of a tunnel at this point; that the cuts were valuable in group development work for the reason that that afforded information as to the stratum in which they were dug away from the weathering; that the sandstone cut with the thin seam of shale in one corner, which from tracing the outcrop satisfied him was a solid body, furnished "negative information"; that 15 feet above the cut on Spad 5 there is a bluish shale 3 to 6 inches wide which he traced to Spad 1 and sampled and retorted, obtaining in a 14-inch cut 29 gallons of oil per ton, and that this cut could be used as a portal of a tunnel to drive under shale strata lying above it, which may be mined, though "I am not saying that it will be mined, but it may be by that method"; that he did not think Dere had ever discussed with him any plan for using the cuts as an air shaft. It was his opinion that it is always possible to use any open cut as the portal of a tunnel if placed in such a position as to develop the ground above it, and would benefit the property in which it is put, and he had that intent with every cut he put in, except one on top, where it would have to be a shaft.

The inspectors who testified for the Government admit that it is possible to drive a tunnel from the cut on Spad 6 in such a direction as to intersect shafts driven from the other two cuts, but were of the opinion that it is impracticable. Among the criticisms they made to such a scheme of mining were that a tunnel following a northerly course with Davis Gulch would leave no room for chambers on the west side of it; that the floor of the cut is 14 feet above the bottom of the Mahogany shale, and if run to conform to dip of the strata and provide for drainage would run out and above the Mahogany shale; that if air shafts were needed they could be placed at lower elevation then at the sites of the other cuts, so as to eliminate 150 feet of shafting; that the sandstone cut on Spad 4 furnishes no additional information as to the same strata on Spad 3, as it is naturally exposed for about 200 feet closer to Spad 3; that the same is true of the cuts in shale on Spads 5 and 6, as shale is naturally exposed by erosion on those claims.

19 "Under the decisions of the courts and the Land Department labor or improvements to be credited must actually promote or directly tend to promote the extraction of mineral from the land or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the works thereon or pertaining thereto." Highland Marie and Manilla Lode Mining Claims and cases there cited. (31 L. D. 37, 38.) Under this rule the department has held the value of the shafts upon a placer claim, apparently not sunk to actually extract mineral but to secure data upon which to base later development work, which in that case consisted of a long tunnel finally reaching pay gravel (Kirk et al. v. Clark et al., 17 L. D. 190), and a drill hole placed upon a claim for the purpose of prospecting it and to secure data as a basis for further development (C. K. McCormick et al., 40 L. D. 498, 500) were properly creditable in meeting the expenditure required of $500, as a condition precedent to entry and patent under section 2325, Revised Statutes. And whatever may be credited as labor and improvements to satisfy the requirements as to annual labor under section 2324 may also be credited under section 2325, and the decisions of the courts construing or interpreting such provisions under section 2324 may be resorted to in determining what expenditure in labor and improvements may be credited under section 2325, or vice versa. Zephyr and other Mining Claims. (30 L. D. 510, 513.)

And such labor and improvements may be in fact outside the claims or claims in common, or on only one of the several claims in common, provided the claims for which the credit is sought are contiguous and held in common and intended to aid in the development of the claim or claims in common, as the case may be, and the improvements are of such a character as to redound to the benefit of all. Copper Glance Lode (29 L. D. 549) and cases there cited. But the fact that such work has been done and its relation to the claim for which patent is sought must be clearly shown. (Clarke Quartz Pocket Lode, 27 L. D. 351.) The claimants of such improvement must show that such work was intended at the time as annual assessment work for the particular claims. (Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 111 Pac. 585.) The labor or
20 improvement so sought to be credited must have a direct relation to the claim, or be in reasonable proximity to it. (McGarrity v. Byington, 12 Cal. 426).

In Fredericks v. Klauser (96 Pac. 679, 680) the Supreme Court of Oregon defined the word improvement as used in section 2324 as "such an artificial change of the physical conditions of the earth

in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character." (Underscoring supplied.) Applying these rules to the facts as disclosed in the record, the department is unable to find that these three cuts were part of one general scheme of development for the benefit of the six Spad claims or any number of them or that they are of such a character as to redound to the benefit of all. These facts stand out clearly: there is no tunnel or portal of a tunnel and no air shaft; there is nothing in the character of those cuts, as described by any of the witnesses, that evidences that they were designed for such purpose; there is no evidence even upon the part of Dere that the cuts on Spads 4 and 5 were intended by him as the beginnings of air shafts for his tunnel. Indeed, his testimony leads to the opposite inference, inasmuch as he stated that he started the cut on Spad 4 with the thought that he was getting into good shale, and found he was in sandstone, and the locus of the cut on Spad 5 was selected by a 17-year-old boy, who was instructed to dig a cut of certain dimensions 500 feet from a cabin. It would seem unnecessary to observe that air shafts for such a vast and expensive improvement are not planned in that haphazard way. There is only the evidence of the mining engineers, who testified for the defendant to the effect that the cuts on Spads 4 and 5 might fit into a practicable scheme of attack upon the oil shale by tunneling from the cut on Spad 6, if upon further study of the ground and a determination of the best methods of mining the deposit such a method were adopted. Although it may be true that a shallow assessment hole in a stratum of shale may furnish some information as to the character and value of the stratum disclosed and does furnish definite information as to the nature and condition of the
21 strata away from the effects of weather and information as to local dips, there is no specific evidence in this record pointing out how the cut, practically in barren sandstone on Spad 4, and the cuts on Spad 5 and 6, where the oil shale strata were exposed by erosion, would be of service as information as a basis for future development of Spad 3 or any other claim of the group other than the claim upon which the cut was made. The fact that such an assessment hole might be utilized as a portal for a tunnel or in the construction of an air shaft under some later plan of development is insufficient to credit its value as a group improvement. The fact that claims cover a continuous deposit covering one ore mass does not relieve the claimants of the improvements thereon from the requirement of showing that they will aid in the extraction of the mineral or will tend to promote the development of such claims.

Lawson Butte Consolidated Copper Mine (34 L. D. 655). The cut on Spad 6 does not reveal or suggest in itself any design to drive a tunnel from that point. The only testimony is the naked, uncorroborated assertion of Dere that such was his purpose in digging it, which the appellant contends is sufficient. Even if this statement were accepted as sufficient, and allowing the utmost credit claimed by the defendant as the value thereof, to wit, $287.75, based upon the data as to costs supplied by this witness, the amount is insufficient when distributed pro rata among the six claims that it is alleged it was intended to benefit to satisfy the requirement as to assessment labor on Spad 3.

Counsel for the defendant relies upon the rule that "it is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property or to determine whether one mode of use would be more beneficial than another" (Lindley on Mines, Vol. 2, third ed., section 631). This rule has been followed by the department in controversies as to whether a certain improvement that had been made would aid in the development of a group of claims (Hughes et al. v. Ochsner et al., 27 L. D. 396), or where it is a question of whether some better method could have been pursued than that actually pursued (C. K. McCormick et al., 40 L. D. 498). The answer of the court in Copper Mountain M. & S. Co. v. Butte Corbin Consol. C. & S. M. Co., 22 supra, to the same contention made in that case, seems apposite here. The court said, in deciding that a certain tunnel did not tend to benefit the claims in question:

"Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule. (Menn v. Budlong, 129 Cal. 577, 62 Pac. 120; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600.) Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaption to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded."

See also Dolles v. Hamberg Consolidated Mines Co. (23 L. D. 267, 274).

The conclusions of the department are that the three open cuts, or any one of them, has not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown

that they were made in furtherance or are a part of a general scheme to develop the claims as a group. For these reasons the commissioner's decision is affirmed.

(Signed) E. C. FINNEY,
First Assistant Secretary.

Exhibit "B" to petition

Department of the Interior, Washington

A. 10053. February 8, 1928

Address only the Secretary of the Interior.

Emil L. Krushnic

"N." Glenwood Springs 022364. Motion denied

Motion for rehearing

Emil L. Krushnic has filed a motion for rehearing in the
23 matter of his application, Glenwood Springs 022364, for patent to the Spad No. 3 oil shale placer claim covering the N½ N½ sec. 12, T. 5 S., R. 96 W., 6th P. M., Colorado. By decision dated October 3, 1927, the department affirmed the decision of the Commissioner of the General Land Office rejecting the application and held the claim to be null and void. The grounds for the department's decision were that under the provisions of section 37 of the act of February 25, 1920 (41 Stat. 437), known as the "leasing act," the shale deposits within this claim were subject only to disposition in the form and manner provided by that act and that the claim was not within the saving clause of section 37, which excepts from the operation of the act "valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery"; that to maintain a claim in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes, and failure to fulfill this statutory requirement as to a claim unperfected by a certificate of entry terminates by the force and effect of section 37 all rights of the claimant under the general mining laws; and the shale deposits thereon became subject to disposition only under the leasing act.

The Spad No. 3 claim is one of a group of six claims located in 1919. The sufficiency of the exposures of oil shale on the claim to constitute a valid discovery is not questioned. The claim appears to have been a valid claim existent on February 25, 1920, the date upon which the act became effective, but it is admitted by claimant that no work or improvement as required by section 2324 was performed on the claim on or before July 1, 1921, to which date Congress by the act of December 31, 1920 (41 Stat. 1084), extended the time for doing the annual assessment work for the calendar year 1920. Subsequently the present claimant acquired the title of the other locators of this claim, and annual assessment work was performed for 1921, 1922, and to the time of the institution of this inquiry, which work exceeds in value the sum of $500 required by law to be
24 done as a prerequisite to the grant of a patent. The claimant sought to have accredited as assessment work for 1920 the aggregate value of three holes made in 1920 on other claims of the Spad group as common improvement for the benefit of the claims as a group, which work after due notice and hearing was held not to have any tendency to in any wise develop the claims as a group, nor was it shown that they were made in furtherance or a part of a general scheme to develop the claims as a group.

The motion challenges the correctness of the application of the rules as to group development to the three holes made in 1920, and in addition it is contended that, irrespective of whether or not the work was performed in the year 1920, the department, under rules established in a number of its decisions and decisions of the courts, has no concern with the performance of annual assessment work on oil-shale placer claims; that whether it can enter upon this inquiry or not, by the resumption of work upon the claim prior to any acts of physical reentry or the institution of proceedings of ouster or to determine the validity of the claim, a forfeiture was prevented and the location is therefore a " valid claim " within the meaning of section 37 of the leasing act, and to hold otherwise is an attempt to destroy a vested right; that even upon the assumption that the language in section 37 declares unequivocally that upon failure to do the assessment work, the possessory title to an oil-shale claim would be forfeited to the United States, the United States in its proprietary capacity is now equitably estopped from claiming a forfeiture; that the rule of property prevents an automatic forfeiture.

Able and elaborate arguments in connection with the rehearing have been presented orally before the Secretary and in briefs filed by claimant's counsel and counsel for other oil-shale claimants who were allowed to appear as amicus curiæ. The department fully appreciates the importance of the question in its effect upon the valid-

ity of a large number of oil-shale and other locations made for minerals subject to disposition under the leasing act. It also has lively apprehension of the far-reaching results if the decision assailed is overturned upon the public interest in abridging the operation, or greatly diminishing the possibilities of the operation of the
25 leasing act, which secures to the Government some measure of control over the development and production of such mineral resources named therein for which there is present demand, and which reserves the title in the United States to other minerals for which there is no immediate economic need, and which provides in cases of both present and future utilization a substantial source of public revenue in rents and royalties. In efforts to minimize the effect of sustaining the contention of claimants in this case, it is stated in the brief that but ten per cent of the oil-shale land was covered by locations made prior to the leasing act. The department has no certain and complete data available, but is in receipt of official information to the effect that of the approximately 1,000,000 acres of oil-shale lands in the Green River formation, Colorado, from 600,000 to 750,000 acres are blanketed with oil-shale location notices of record antedating the leasing act and that those cover what is considered the richest and most commercially valuable shale.

With respect to the contention renewed on rehearing that mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it suffices, it is needful only to say that this contention was given fully consideration when the decision was rendered, and it is not considered to be law nor in harmony with the decisions of the department or the courts. The department found that these cuts were not made with any intent that they were to be a part of a general scheme of development of the claims as a group, and sees no reason to disturb that finding. The question of the applicability of the work as common improvement must be determined from the particular facts and circumstances in each case. The supplemental affidavit filed on rehearing to the general effect that a custom existed in the shale regions to perform such work by putting in open cuts on one or more of the claims of a group at an expense equal to $100 for each claim when prorated is immaterial. No such custom, should it exist, will be permitted to override the requirements of law. Putting this so-called group work out of view as of no avail, attention will be given to the larger questions raised in the brief.

26 As stated in the previous decision and admitted in one or more briefs filed, the leasing act is in effect a withdrawal of the mineral lands therein described. It is likewise a repeal of the

mining laws in so far as they relate to such lands, except those lands embraced in claims that are excepted from the operation of the leasing act by section 37 thereof. The claimant is seeking title under the general mining laws to lands containing oil shale. It is incumbent for him to show that his claim falls within the exception mentioned in section 37, and it is the duty of the department as guardian of the public domain charged with the administration and disposal of public lands to inquire whether his claim meets the requirements of that section. The excepting clause in that section declares in plain and specific language that the claim must be maintained after the passage of the act in compliance with the laws under which initiated. Section 2324, Revised Statutes, being one of the laws under which the claim was initiated, declares "that on each claim located after the tenth day of March, eighteen hundred and seventy-two, and until patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made by the tenth of June, eighteen hundred and seventy-four, and each year thereafter." There follows in the same section a provision that "upon failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location."

The provision for the performance of $100 worth of labor or improvement is mandatory. The well-settled construction of these provisions of the section is that the necessity of doing the work is imperative in order to maintain the claim. (Chambers v. Harrington, 111 U. S. 350, 353, and other cases cited in note 231, section 30, U. S. C. A.). It has been repeatedly held that development work is the condition of the miner's continued possession (O'Reilly v. Campbell, 116 U. S. 418, 423; Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 440), which can only be maintained by annual
27 expenditure thereon of the work required by law. As stated in El Paso Brick Co. v. McKnight, 233 U. S. 250, 256, "Locators of mining claims have the exclusive right of possession of the surface so long as they make the improvements or do the annual assessment work required by the Revised Statutes, section 2324." (Underscoring supplied.) Development by working is a condition to continued ownership until patent issues. (Erhardt v. Bearo, 113 U. S. 527, 535.) To keep up and maintain a valid location one hundred dollars' worth of work and labor must be done or improvements made during each year until patent issues therefor. (Gwilliam v. Donnellan, 115 U. S. 45.) Every person who continued in possession

of such property without performing annually the labor that has been specified violates the conditions of the grant from the Government. (Honaker v, Martin (Mont.), 27 Pac. 397, 398.) In view of these well-settled constructions of the mining laws, which Congress may be presumed to have known the leasing act was passed, there would seem to be no doubt that to maintain a claim in compliance with the laws under which initiated necessarily meant the performance of the requirements of annual labor and that there was no other intent or purpose in the use of such words than to protect and preserve only claims where the possessory rights had been maintained. As between the Government and the claimant the test of the validity of the latter's claim is found in the provisions of section 37, and not that part of section 2324, Revised Statutes, which defines his rights with respect to some stranger who seeks to relocate the claim. The language of the court in the Yosemite Valley Case, 15 Wall. 77, 93, with certain interpolation of words to agree with the facts here, sharply brings into view what is believed to be the fallacy in the argument as to the right of resumption of work. The court said:

"The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition (retention) by the settler (mining claimant) of a legal right to the land occupied by him as against the owner, the United States, and the acquisition (retention) by him of a legal right as against other
28 parties to be preferred in its purchase when the United States have determined to sell."

When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights against the Government in and to this location upon oil-shale lands were extinguished, and this claimant, who acquired the outstanding interest of the other locators and proceeded thereafter to reenter and perform work on the land that was no longer subject to the general mining laws, was no more than a trespasser, and could neither revive nor initiate any rights to the land thereby. The foregoing view finds strong support in a recent decision of the Circuit Court of Appeals for the 8th Circuit in the case of Hodgson v. Midwest Oil Company, 17 Fed. (2d) 71, where it was held that the failure to do the assessment work for 1921 upon an oil placer claim located in 1887 on lands included in a petroleum withdrawal made in 1909 terminated all possessory rights thereto. The court said (page 77):

"Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate."

Nothing is perceived in the language employed by Belk v. Meagher, 104 U. S. 279, and the many decisions of the courts and departments, relied upon by claimant and amicus curiæ applying the doctrine of that case, which dealt with the possessory rights of rival mining claimants, based upon the construction solely of the general mining laws that conflict with this conclusion. Much emphasis is placed on this passage in the opinion in the Belk v. Meagher case (p. 282):

"For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditures on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them before a new location was made. Such being the law, it seems to us clear that if the work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as
29 they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that if no work is done before January, 1875, all rights under the original claim are gone, but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued without any work at all until Jan. 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new. (Underscoring supplied.)

There is no doubt that the doctrine above quoted continues to be the law as to mineral lands that continue to be subject to location and purchase under the general mining law, but it is not the law as to mineral lands affected by the leasing act. Section 37 thereof at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title that it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section

37 is that if the annual work is not done, all the rights of the claimant are gone. When the law on a particular subject is radically changed by statute, decisions under the old law become of little value as authority. (Lemp v. Hastings, 4 Greene (Ia.), 448.) The courts may properly refuse to follow precedents where the reasons upon which such precedents are based no longer exist. (Jennings v. State, 13 Kan. 80; Brennan v. New York, 1 Hun. 315, 47 How. Prac. 178.)

In the interpretation of the text of the excepting clause in section 37, it is contended in some of the briefs that it was recognized
30 that a claim might be valid though imperfect. Emphasis is placed upon the concluding words—" which claims may be perfected under such laws, including discovery." It is argued that by providing that a discovery might be included in the process of perfecting a claim Congress necessarily indicated that claims having other imperfections are within its meaning. As persuasive of this view, attention is invited to the discussion of this section (then 36 of the Senate bill) in the Senate, reported in vol. 58, part 5, pages 4577–85, of the Congressional Record, which resulted in the addition of the words " including discovery."

In view of the plain requirements of the statute that the claim must be maintained in accordance with the mining laws under which initiated, it is not considered that resort to extrinsic sources is necessary to ascertain its meaning with respect to the requirement of maintenance. Nevertheless, after careful reading of the discussion to which attention is invited, the conclusion is believed unescapable that the addition of the words " including discovery " was to place claims upon which there were bona fide claimants at the date of the passage of the act diligently engaged in prosecution of work looking to discovery and who continued in such work to discovery upon the same footing as those mining claimants similarly engaged on oil and gas-bearing lands within their claims whose rights were preserved from the operation of withdrawals under the Picket Act. (Act of June 10, 1910, 36 Stat. 847.) Long before the passage of the leasing act the courts in their decisions had recognized that a locator in actual possession of his claim and diligently and in good faith engaged in the prosecution of work to discover mineral thereon by license if not by invitation of the Government and who had made large expenditures thereon had a substantial interest in the claim, and that his possession was entitled to protection against those who had no better right. The Picket Act and the leasing act recognized such rights as worthy of protection from withdrawals. There is no warrant for the inference that the leasing act intended to protect the negligent or those who had not manifested their good faith by

doing the annual labor and had done nothing with the intent of actual development. There is nothing in the terms of section
31 37 that warrants the construction that if one particular specified imperfection is excused another imperfection or any number of imperfections may likewise be overlooked. Such a construction is repugnant to the spirit and purpose of the act and would render it practically ineffective and nugatory as to any lands covered by a location which some one claimed.

The decision assailed did not question, and no other case has questioned, the rule laid down in numerous departmental decisions that controversies between rival claimants or adverse claims to the same mining location belonged in and should be settled in the courts. Such controversies involve disputes between citizens to the possessory rights to a given tract of mineral land. The question of assessment work in those cases, as has been frequently announced, goes to the right of possession between contending parties. The Federal Government is interested only in having a particular tract developed and disposing of it in accordance with law. It is immaterial in such cases whether A or B has the better claim, or whether one or the other performs the assessment work and secures patent assuming both qualified. The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the Government or the individual has the better right. The question is one of validity, and under the section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land and which relate solely to the right of possession are committed exclusively to the courts. (Bunker Hill v. Shoshone Min. Co., 33 L. D. 142, 147.) The opinions relied upon in the briefs in cases of Yosemite National Park (25 L. D. 48) and Navajo Indian Reservation (30 L. D. 515), where under the particular wording of those reservations mining claims were excluded and remained excluded irrespective of compliance with the mining laws, do not conflict with
32 the views here expressed. The claimants here seek to invoke a rule to a situation where the reason for the rule does not exist.

The contention that the Federal Government must act the part of an adverse claimant in this and similar cases and be alert and vigilant and take some affirmative action to termin'te the rights of

defaulting claimant before he resumes work, such as by a physical reentry or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable. Prior to default in assessment work, the claimants had neither the legal nor full equitable title. All they had was a possessory title, i. e., a mere right of possession and enjoyment of the profits without purchase and upon condition which may be defeated at any time by the failure of the party to comply with the condition, viz, to perform or make the annual improvement required by the statute. (Benson Mining Co. v. Alta Mining Co., v. Alta Mining Co., 145 U. S. 428, 430.) The fee was and now is in the United States.

There is no attempt herein to gainsay the doctrine that so long as claimants complied with the condition, by doing the annual work, they had a vested property right protected by constitutional guarantee, but it is a far and unwarranted step to contend from the doctrine that by virtue of the provisions of section 2324 as to resumption of labor, after breach of condition, all rights of the claimant as against the Government were as before, and the estate was preserved, in the face of the provisions of the leasing act withdrawing the lands and providing for a radically different mode of disposition of the *min*erals. In Donnelly v. United States (228 U. S. 243), where the defendant sought to establish a want of Federal jurisdiction over a crime by showing that the crime was committed on a mining claim within the limits of the Hoopa Valley Indian Reservation, the court said: "The prime requisites for the validity of a mining claim are discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work; where the records does not disclose facts showing the existence of these elements a finding can not be supported that valid rights against the Government existed." (Underscoring supplied.)

33 No plausible ground is made out for applying the doctrine of estoppel against the Government based upon the fact that work was performed on the claim before adverse action was taken by the Land Department. It is manifest the assumed parity or analogy between the status of a mining claim after default in maintenance and a vested estate in fee under a railroad or other grant which is subject to forfeiture for breach of condition subsequent does not exist. The rule is well settled that a legislative act directing the possession and appropriation of lands is equivalent to office found; that any public assertion by legislative act of the ownership of the State, after default of the grantee, such as an act resuming the control of them and appropriating them to particular uses, will be equally effective and operative. (United States v. Repentigny's Heirs, 5

Wall. 211; Schulenberg v. Harriman, 21 Wall. 44; Farnsworth v. Minnesota & Pacific Railroad Company, 92 U. S. 49; McMicken v. United States, 97 U. S. 204, 217, 218.) The land within the claim having become subject to the full force and effect of the withdrawal as between the Government and the claimant, all subsequent efforts by them could not serve to divert the Government of its proprietary title therein. (United States v. McCutchen, 234 Fed. 702, 711.) Irrespective of the true intent and meaning of the statute, the doctrine of the rule of property presents no substantial defense in this case. The cases cited in the briefs on this point did not involve a construction of the law here in question, nor any statute or withdrawal order of like import, nor do they sustain the proposition that the department has disclaimed jurisdiction or declared it to be its policy not to inquire into the doing of annual assessment work and labor where there is a question whether a mining claim was excepted from a withdrawal for a public purpose. As heretofore shown, those cases between rival and conflicting claimants to a particular tract are inapposite. Likewise, the decisions in South Dakota v. Thomas (35 L. D. 171), Wilson v. State of New Mexico (45 L. D. 582), Lizzie Trask (39 L. D. 279), James Morris (47 L. D. 326), and others of similar nature, holding, in effect, that the rights of a bona fide settler on public land, who was overtaken by a withdrawal
34 which saved from its operation only those who had complied with the law under which the settlement was made, were not affected by the statutory requirement that entry should be made in the local office within three months "otherwise his claim shall be forfeited" do not clash with those views. Those cases simply followed the construction of the act in Johnson v. Towsley (13 Wall. 72) to the effect that the filing requirement was a rule to be applied solely between conflicting settlers on the same land.

Contrary to the contentions made in the briefs, there are a number of decisions by the department that declare its right to determine whether valid rights exist in mining claims within the scope and limits of the terms of a withdrawal and make clear the distinction in such cases and cases between rival claimants. In Navajo Indian Reservation, supra, it was said (p. 517):

"Questions concerning the respective rights of adverse claimants to possession of mineral lands, under locations thereof, are to be determined by the courts (Barklage v. Russell, 29 L. D. 401), but for administrative purposes it is proper and necessary, in a case like the one here presented, for this department to determine whether, at the date of said Executive order, a valid right had attached to any tract within the limits described in said order.

The opinion rendered in that case, as stated in E. C. Kinney (44 L. D. 580), that the withdrawal did not attach upon the default of the mineral claimant, was predicated upon the particular language employed in making the reservation. It was plainly indicated that the reservation might have been worded in such a way that the withdrawal would have attached upon default of an existing claim so as to prevent relocation. Other reservations were referred to which were made in such form as to save existing claims so long as the requirements of the law were complied with but which caused the withdrawal to attach and reserve the lands and prevent their disposal in case of default of the claimants who held the land at the time of the reservation.

The effect of a withdrawal under the reclamation act for irrigation works was considered in 32 L. D. 387, and it was there stated that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to perform the necessary yearly labor; also, that the department has jurisdiction to determine whether such right was divested so as to restore the land to the control of the Government. Following the above-stated views, it was held in the Kinney case that "A mining claim as to which the claimant was in default in the performance of annual assessment work at the date of a withdrawal for the construction of irrigation work under the reclamation act does not except the land from the force and effect of the withdrawal." The conclusions in the Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262) and Cronberg et al. v. Hazlett (51 L. D. 101) are in harmony with the Kinney Case and previous decisions there cited, the case of Cronberg et al. v. Hazlett being the first involving the construction of section 37 in its bearing on defaults in the performance of assessment work upon mining claims located upon mineral lands within the purview of the leasing act.

The above review of the authorities sufficiently demonstrates that there has been no change or shift in departmental policy or in its rules of construction and that there was no decision upon the faith of which the claimant would be justified in assuming that his rights under the provisions of the leasing act would be preserved by the performance of annual labor after default. And no rights could arise by virtue of such acts done in defiance or disregard of the provisions of the act, or even done in moral good faith based on a construction placed upon it by reputable legal advisers. The decision assailed follows and applied the construction of the act in the Cronberg Case. The fact that there were adverse claimants under the leasing act in that case and the Chittenden Case is immaterial. The fallacy of this attempted distinction is immediately apparent, be-

cause if the land had not revested in the United States by the force of the act no rights could arise or claim be recognized under it.

Finally, some observations will be made upon the results if the contentions of the claimant and amicus curiæ in this case were adopted. They would lead to the absurd and unwarranted situation that claimants could for years maintain a paper possession of portions of the public domain, not performing a stroke of work or spending a dollar in money. In action and failure to comply
36 with the law would be rewarded and such claimant would be protected to the same extent and in the same manner as another claimant who had in every respect complied with the provisions of the general mining laws and with section 37 of the leasing act. Not only shale lands in the public domain would be subject to these paper claims, but lands specifically withdrawn for governmental use, as naval reserves or otherwise, would be subject to the assertion of these paper claims at any time in the future years, unless and until the Government ran down each paper location recorded in the various county offices in the Western States and instituted a formal proceeding to cancel something which had lapsed and been abandoned through the failure of the claimants to carry out the specific requirements of the law.

When the decision in this case was prepared, the department was fully impressed with its importance on account of its involving principles which will become precedents in cases of similar nature now pending or later arising. It was therefore given a most careful examination, and this petition has had the same attentive consideration. The result is that the department sees no reason to depart from its previous conclusion. The motion is therefore denied.

(Signed) HUBERT WORK, *Secretary.*

In Supreme Court of District of Columbia

Rule to show cause

Filed March 30, 1928

* * * * * * *

Upon consideration of the verified petition filed herein by the plaintiff, it is by the court, this 30th day of March, A. D. 1928, adjudged, ordered, and decreed that the defendant, Hubert Work, Secretary of the Interior, be, and he is hereby, required to show cause before the Supreme Court of the District of Columbia, on the 20th day of April, A. D. 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be issued requiring and commanding him to make, execute and

37 deliver to Emil L. Krushnic, plaintiff herein, a patent in fee simple to the following described land situate in Garfield County, Colorado, to wit:

N½ N½ sec. 12, T. 5 S., R. 96 W., of the 6th P. M.

WENDELL P. STAFFORD,
Justice.

Marshal's return

Served a copy of the within rule on Hubert Work 3/31/28 personally.

EDGAR C. SNYDER,
U. S. Marshal in and for the Dist. of Columbia,
By HAROLD T. SCOTT,
Deputy U. S. Marshal.

In Supreme Court of District of Columbia

Response to rule to show cause

Filed April 12, 1928

* * * * * * *

The defendant Hubert Work, as Secretary of the Interior, responding to the rule to show cause herein, admits the material allegations set forth in the bill of complaint, but, forasmuch, as in the aggregate said allegations furnish no proper grounds for granting the relief prayed, he moves the court to dismiss the bill and discharge the rule, at plaintiff's costs, as well as for the following additional reasons:

1. By statute the Secretary of the Interior is vested with authority and discretion to construe the public land laws of the United States, of which the mining laws are a part; and the bill of complaint discloses that the determination of the questions therein alleged to have been presented to that officer was the result of the exercise of official judgment and discretion, was not the result of arbitrary or capricious action, but, on the other hand, was thoroughly presented by counsel and exhaustively considered and discussed by him in reaching his decision; such action will not be controlled, reviewed, reversed, or modified by any court in a mandamus proceeding.

2. The decision of the Secretary of the Interior herein
38 sought to be controlled by a writ of mandamus is final and conclusive on plaintiff, and this court has no jurisdiction thereof.

3. The bill further discloses that plaintiff has failed to maintain his original right to the placer mining claim involved in that he has omitted to perform the labor at the time provided therefor by law, and thereby has permitted such claim to lapse; that under such

a condition Congress, by the act of February 25, 1920 (41 Stat. 437), appropriated the land to the purposes of said act, and thereby prevented plaintiff from reviving and reinstating said original lapsed claim.

4. That the provisions of the leasing act, without more, operated, at a time when the tract involved was under no valid existing claim in favor of plaintiff or anyone else, except the paramount ownership of the United States, to withdraw said land from the operation of the mining laws under which plaintiff had formerly initiated his claim and to place it entirely and wholly under the provisions of said leasing act.

5. The bill discloses no right in plaintiff to the relief prayed.

HUBERT WORK,
Secretary.

[*Duly sworn to by Hubert Work; jurat omitted in printing.*]

In Supreme Court of District of Columbia

Order discharging rule to show cause and dismissing petition

Filed June 28, 1928

* * * * * * *

39 The above-entitled cause came regularly on for hearing on the response to the rule to show cause why a writ of mandamus should not issue to the defendant Secretary of the Interior herein; and the court, after due examination of the pleadings and after duly considering the argument and briefs of counsel for the respective parties, and being fully advised, on this June 28, 1928, discharges the rule to show cause and dismisses the petition for writ of mandamus, at plaintiff's cost, to be taxed by the clerk as provided by law.

WENDELL P. STAFFORD,
Justice.

In Supreme Court of District of Columbia

Note of appeal

From the foregoing action of the court plaintiff notes an appeal in open court to the Court of Appeals of the District of Columbia and fixes the bond for costs in the sum of $100, with leave to deposit $50 cash with the clerk in lieu thereof.

WENDELL P. STAFFORD,
Justice.

In Supreme Court of District of Columbia

Memorandum re bond

June 28, 1928.—$50 deposited in lieu of undertaking on appeal.

In Supreme Court of District of Columbia

Stipulation re substitution

Filed August 7, 1928

* * * * * * *

It is hereby stipulated and agreed by and between the parties hereto, in view of the resignation of Honorable Hubert Work, as Secretary of the Interior, and the appointment of his successor in office, that the above-entitled cause shall be continued and maintained against the successor in office of said Hubert Work, Honorable Roy O. West, as Secretary of the Interior, in accordance with 43 Stat. L. 941.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.
E. O. PATTERSON,
Solicitor Int. Dept.
O. H. GRAVES,
Asst. to Solicitor,
Attorneys for Defendant.

In Supreme Court of District of Columbia

Assignment of errors

Filed August 7, 1928

* * * * * * *

The Court erred—

1. In its order of June 28, 1928, dismissing plaintiff's petition for writ of mandamus.
2. In its order of June 28, 1928, discharging rule to show cause.
3. In not holding that plaintiff's petition for writ of mandamus states a cause of action entitling said plaintiff to the relief prayed for in said petition.
4. In not recognizing the vested property right of plaintiff herein.

5. In failing to hold that the act of February 25, 1920 (41 Stat. 437), did not take away from the plaintiff the right of resumption of work after default in the performance of annual labor and prior to entry by some third person or steps taken by the United States to terminate the mining claim of the plaintiff.

6. In not holding that the plaintiff's property is taken without due process of law under the fifth amendment to the Constitution of the United States.

7. In failing to give proper legal effect to section 2324, Revised Statutes of the United States.

41-42 8. In failing to give proper effect to section 37 of the act of February 25, 1920 (41 Stat. 437).

9. In other respects apparent of record.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.

In Supreme Court of District of Columbia

Designation of record

Filed August 7, 1928

* * * * * * *

The clerk will please include in the transcript of record on appeal the following:

1. Petition for mandamus and exhibits thereto.
2. Rule to show cause.
3. Response to rule to show cause.
4. Order discharging rule to show cause and dismissing petition and appeal.
5. Clerk's memorandum of deposit for costs.
6. Assignment of errors.
7. Stipulation.
8. This designation.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.

Service of above designation acknowledged this 7th day of August, 1928.

O. H. GRAVES,
Atty. for Defendant.

[Clerk's certificate to foregoing transcript omitted in printing.]

43 [Argument and submission, Dec. 5, 1928, omitted in printing.]

44 In Court of Appeals of the District of Columbia

No. 4823

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC, APPELLANT

vs.

ROY O. WEST, AS SECRETARY OF THE INTERIOR

Appeal from the Supreme Court of the District of Columbia

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices

Opinion

Filed Jan. 7, 1929

Mr. Justice VAN ORSDEL delivered the opinion of the court:

VAN ORSDEL, Associate Justice:

Appellant, hereafter referred to as plaintiff, filed his petition for a writ of mandamus against the Secretary of the Interior to compel the issuance to him of a patent to certain oil shale mining land in Garfield County, Colorado. On the response to the rule to show cause, the court, on hearing, discharged the rule and dismissed the petition.

From the facts set forth in the petition, and admitted by the response to the rule, it appears that plaintiff and seven associates, on October 1, 1919, located, together with a number of other claims, the mining claim here in question known as Spad No. 3 placer claim, which was at that time subject to appropriation under the mining laws of the United States. An attempt was made by plaintiff and his associates to perform the actual labor required on the claim for the year 1920. The labor performed was on contiguous
45 claims, and not on the claim in question, which led to a dispute as to the sufficiency of the performance of the assessment work for the year 1920. Thereafter plaintiff acquired the interest of his colocators and performed the labor required for the assessment year 1921, and continued to perform annual labor until the improvements on the claim were of a value of more than $500.00, when he applied for a patent on December 16, 1922.

It further appears that at no time after the date of the original location of the claim was any attempt at relocation thereof made by any other person, and no contest has been instituted by anyone to question plaintiff's ownership of the claim. However, after the application for patent was made, contest proceedings were instituted by officers of the Department of the Interior. On hearing, all the charges made by the Government against the claim were either withdrawn or dismissed by the register, except the charge as to the insufficiency of the annual labor for the assessment year 1920. On this ground alone the Commissioner of the General Land Office held the claim to be null and void, and this holding was approved by the Secretary of the Interior.

Plaintiff then filed his petition in the Supreme Court of the District of Columbia for a writ of mandamus, and from the order of the court dismissing the petition this appeal was taken.

It is conceded by counsel for the Secretary that but for the in-
46 tervention of the leasing act of February 25, 1920, 41 Stat. 437, during the time when this claim was subject to relocation, plaintiff, under the mining law in force prior to the passage of the leasing act, would be entitled to his patent.

The pertinent provisions of the mining law applicable to this case are found in sections 2324 and 2325, Rev. Stats. U. S. Section 2324 provides in part as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent had been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year * * *; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides the procedure for obtaining a patent, and among other things, "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or his grantors."

We come now to consider the effect on plaintiff's rights by reason of the intervention of the leasing act during the period 1920, when, it is asserted, the claim was subject to relocation under the mining law. Section 37 of the act provides as follows:

"That the deposits of coal, phosphate, sodium, oil, oil
47 shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of

the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming,' approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

The Secretary of the Interior, in his opinion refusing to issue plaintiff a patent, recognized the well-established principle under the mining law of 1872 to the effect that a failure to perform the assessment work as provided in the act subjected the claim to relocation, and if it is so located before the original claimant resumes work his rights are lost. But if no relocation is made, and the original claimant resumes work, his rights stand the same as if there had been no failure to comply with the conditions of the act subjecting the claim to relocation.

In his opinion, however, as to the effect of section 37 of the leasing act, he said:

"There is no doubt that the doctrine above quoted continues to be the law as to mineral lands that continue to be subject to location and purchase under the general mining law, but it is not the
48 law as to mineral lands affected by the leasing act. Section 37 thereof at one blow destroyed the right of relocation of such minerals, and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title that it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section 37 is that if the annual work is not done all the rights of the claimant are gone."

We think that the Secretary is in error in his construction of the leasing act. In section 37 of the act, supra, Congress excepted from the provisions of the act valid claims existing at the date of its passage "and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." It will be observed that this provision merely circumscribes the operation of the mining act in respect of certain mineral deposits lying within the public domain and subject to discovery and location under that act. By the leasing act these mineral deposits, including oil shale, are withdrawn from private acquisition, except as to valid existing claims at the date of the passage of the leasing act. There is no apparent intention on the part of Congress, by the provisions of the leasing act, to include within

its terms claims initiated under the mining law, and which
49 had a valid existence at the date of its passage. Inasmuch as it is conceded in this case that but for the passage of the leasing act plaintiff's claim is valid and entitles him to a patent, it must be conceded that its validity, in the absence of any intervening relocator, continued at all times from the date of location until the filing of his application for a patent. We interpret the exception to mean that so long as a person who located a claim prior to the passage of the leasing act maintains and observes the requirements of the mining act, and on complete compliance therewith applies for his patent, he comes within the exception to the leasing act and is not barred thereby. Such a locator is not subjected to any forfeitures that did not apply to the mining act; and the mere fact that oil shale claims were no longer subject to relocation after the passage of the leasing act is of no importance. Until relocation intervened, the claim of the original locator of his lawful successor in interest remained unimpaired. His rights after resumption were restored to exactly the same standing that they had if no default had been made.

The statutory requirement of the mining law of annual expenditure upon an unpatented mining claim never was considered, either by the courts or the Government, as a matter of concern to the Interior Department. Section 55 of the department regulations, adopted after the passage of the mining act, declares that "the annual expenditure of $100.00 in labor or improvements on a mining claim,
50 required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This rule has been followed in the courts generally; and in the Federal courts it has been held that mere failure to perform the required annual labor does not, in the absence of the intervention of a relocator, work a forfeiture. In Bingham Amalgamated Copper Company vs. Ute Copper Company, 181 Fed. 748, the court said:

"The contention is also made that, because the plaintiff failed to affirmatively show the performance of assessment work for its claim for the year 1908, it must be denied relief. A failure to perform the required annual labor does not in and of itself work a forfeiture. It only permits a relocation. As the Abraham claim was located February 25, 1906, it can not be considered a relocation of the plaintiff's claims based on the failure to perform the annual labor for 1908." To the same effect are North Noonday Mining Company vs. Orient Mining Company, 1 Fed. 522; Thatcher vs. Brown, 190 Fed. 708.

Belk vs. Meagher, 104 U. S. 279, was a suit in ejectment between an original locator of a mining claim and a relocator. In that case the rule is clearly announced that mere failure to do assessment work does not terminate the locator's right of possession, until there has been an interruption by the intervention of a relocator. On this point the court said:

51 "It seems clear to us that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred."

In Forbes vs. Gracey, 94 U. S. 762, it was held that while the title to mineral lands remain in the United States until a patent issues therefor, the ores dug and detached from the lands under a mining claim are free from any lien, claim, or title of the United States. They are the personal property of the miner, and as such subject to State taxation. It was also held that a mining claim is property in the fullest sense of the word, and that the claim of the locator is subject to a lien for State taxes and may be sold for the nonpayment of them, without infringing in any respect the paramount title of the United States in the land. This, it will be observed, is

52 clear authority for the proposition that the Government has no responsibility or interest in the contests between rival claimants, or in the ore when detached from the land.

The rule that mere failure to perform annual assessment work does not constitute in itself a forfeiture has been upheld by the courts of the mining States of the West. In Field vs. Tanner, 32 Colo. 278, the Supreme Court of Colorado said:

"It will be observed that failure to do the annual assessment work does not, ipso facto, work a forfeiture of a load mining claim, but the same merely becomes liable to forfeiture, which may be complete and final when the rights of third persons accrue. If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. McGinnis et al. vs. Egbert, 8 Colo. 41; Belk vs. Meagher, 104 U. S. 279." To the same effect are Lacey vs. Wood-

ward, 5 N. M. 583; Emerson et al. vs. McWhirter et al., 133 Cal. 1036; Madison et al. vs. Octave Oil Company, 154 Cal. 768; Florence-Rae Copper Company vs. Kimbel, 85 Wash. 162.

It would require a stretch of the imagination to hold that under this existing policy it was intended by Congress that the Government, through its Secretary of the Interior, might assume the functions of a relocator and enforce the forfeiture of the locator and dispossess him of his claim. The Secretary, however, bases his opinion upon the recent case of Hodgson vs. Midwest Oil Company,
53 17 Fed. (2d) 71. That case, we think, has little if any bearing upon the question here in issue. It turned largely upon a question of pleading. It appears that the original locator located the oil claim in question in Carbon County, Wyoming, in 1887, and alleged in his petition for ejectment that he had been in open, notorious, continuous, exclusive, and adverse possession of the claim from the date of discovery, May 2, 1887, down to April 22, 1921; and that more than $500.00 worth of labor had been expended in improvements thereon prior to September 27, 1909, when by an Executive order of the President of the United States all vacant and unappropriated public lands and petroleum deposits in the public domain were withdrawn from location and entry under the mineral public land laws. He further alleged that on May 10, 1910, William G. Henshaw and seven others secretly, fraudulently, clandestinely, and unlawfully entered upon said mining claim and made a location thereof, and that on August 19, 1920, the defendants filed an application for an oil and gas lease on the said land which was thereafter granted, and that on or about April 22, 1921, the defendants wrongfully and unlawfully entered into the actual, exclusive, and adverse possession of said lands, ousting plaintiff's predecessors therefrom, and have since wrongfully and unlawfully held possession of the same.

The question of pleading on which the case turned was the sufficiency of the averment that plaintiff was ousted from possession
54 by the defendants in 1921. The court, after quoting from Lindley On Mines, 3 (Ed.) section 634, to the effect that a locator can not be deprived of his inchoate rights by the tortuous acts of others, said:

"Now in the instant case there is no plea of any threat of violence or physical opposition whatever. There is no allegation in the petition that the plaintiff or his predecessors, or any of them, ever offered or attempted to do assessment work during the period named (the year 1921). The formal plea of entry and actual, exclusive, and adverse possession of a quarter section of land constituting a placer mining claim located after discovery would not seem to be

equivalent to an allegation of such hostile acts and declarations as to satisfy a man of ordinary prudence that it would be unsafe to begin work."

The court accordingly held that in the absence of any showing of assessment work done for the year 1921 all possessory rights of the plaintiff terminated. In reaching this conclusion, the court said:

"It is clear that such original locator and his assigns were required as a condition subsequent to do the so-called 'assessment work' periodically, and upon failure so to do during any interval fixed by law all possessory rights terminated. Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate. * * * It is well settled that a failure to do the work or have an adequate legal excuse automatically terminates the locator's right of possession."

55 These declarations seem to be in conflict with the settled mining law of more than fifty years. We are unable to find an authority, either judicial or departmental or of a text writer, where it has been held that a relocation of the claim is essential before resumption of work by a delinquent locator. "Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture. It does not restore a lost estate." (2 Lindley, Mines (2 Ed.) sec. 651.) Quoted with approval in Knutsen vs. Fredlund (56 Wash. 634; 106 Pac. 202). The locator neither loses his title in his claim nor automatically terminates his right of possession by mere failure to do his assessment work within the statutory period. These rights can only be affected by the relocation of the claim by an adverse party.

It will also be observed that the opinion was not grounded upon the effect of the intervention of the leasing act further than to hold that by the failure of the plaintiff to perform his assessment work in the year 1921 his rights were lost and the claim became subject to disposition under the existing law which at that date was the leasing act. It involved no construction of the leasing act to the effect that the Secretary of the Interior may assume the status of a relocator or that the exception in the leasing act applied to a case of this sort.

56 The fundamental error in the opinion, as we have pointed out, was in holding that failure to do assessment work automatically terminates a locator's rights. It was this misinterpretation of the law which led the department into error.

We construe the exception in the leasing act as intended to preserve all the rights of the locator of an existing claim at the time of its passage. It is urged, however, by counsel for the Secretary that if the leasing act only prohibits the relocation by the third party of an existing mining claim the original locator may defer his assess-

ment work indefinitely, or at least so long as he may evade the charge of abandonment. It is difficult to conceive just how the disqualification of the relocator can affect rights accorded the locator by the statute. The locator, by virtue of his location and development of the mine, acquires a valuable property right that may never develop into a patent.

In the Forbes case these claims are described as "property in the miner, and property of great value. * * * They are property in the fullest sense of the word, and their ownership, transfer, and use are covered by well-defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, and inherited without infringing the title of the United States."

Neither is this a matter of serious concern to the Government, since these rights were conferred in aid of a policy to insure the
57 development of the mining industry. No intention was displayed by Congress of returning any revenues to the Government from the minerals extracted either before or after patent of the lands. The only possible benefit that accrued to the United States was through the sale of the land for a nominal consideration. It, therefore, was a matter of little concern where the paramount title to the land remained. In either instance the Government was neither a gainer nor a loser. Indeed, by the failure of the locator to purchase, the Government retained title in the land and stood to be a gainer through failure of the locator to protect his rights.

A part of the property right vested in the locator was to resume delinquent assessment work without penalty for his delinquency, and until this right had been foreclosed by the relocation of the mine by a third party it remained a valuable incident of the grant. It logically follows that if Congress in the leasing act had intended to deprive a prior locator of this valuable privilege it would have given expression to that intent in clear and unmistakable language. Not only is the act silent in this particular but there is nothing in the language of the exception on which to hang such a judicial inference. It clearly excepts existing claims that continue to be maintained in conformity with the mining law under which the locator's right had its inception. There is clearly no intent manifested of subjecting this valuable privilege to confiscation by operation of departmental law.

58 We come now to the usual objection presented by the department—namely, the jurisdiction of the court to compel the Secretary, by writ of mandamus, to issue a patent. In this case the court is not invading the exclusive jurisdiction of the Secretary to determine discretionary questions of fact, nor his interpretation

of the meaning of a law upon which the exercise of his discretion depends. In the present case, with the facts conceded, nothing remains to be done by the Secretary but the performance of the mere ministerial act of issuing a patent; and if, as in the present case, the Secretary misinterprets his statutory duties in conformity with the facts, it is well within the power of the court to place its interpretation upon the law and direct the Secretary to act in accordance therewith. Perhaps the power of the court in cases of this character, to control the acts of an executive officer by mandamus, is best expressed in Roberts vs. United States, 176 U. S. 221, where the court, speaking through Mr. Justice Peckham, said:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and
59 in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, construction of its language by the officer. Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties whenever they should plead that the duty required of them arose upon the construction of a statute no matter how plain its language nor how plainly they violated their duty in refusing to perform the act required."

Coming to the more concrete application of the foregoing rule to the present case the court, in Ballinger vs. United States ex rel. Frost, 216 U. S. 240, sustaining an application for a writ of mandamus to compel the Secretary of the Interior to deliver a patent to certain Indian lands, quoted from leading decisions as follows:
60 "The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty." Barney vs. Dolph, 97 U. S. 652, 656.

"Where the right to a patent has once become vested in the purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty." Simmons vs. Wagner, 101 U. S. 260, 261.

"No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus." United States vs. Schurz, 102 U. S. 378, 403. To the same effect are Lane vs. Hoglund, 244 U. S. 174; Work vs. United States, ex rel. McAlester-Edwards Company, 262 U. S. 200.

In the present case it is conceded that but for the intervention of the Leasing Act appellant would be entitled, under the law, to his patent. In this situation clearly nothing remains for the Secretary but to comply with the law and issue the patent; and this may be compelled by a writ of mandamus. "The rule applicable in such a situation is that 'a person who complies with all the requisites
61 necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof.'" Payne vs. Central Pacific Railway Company, 255 U. S. 228, 237.

The judgment is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

[File indorsement omitted.]

62 In Court of Appeals of District of Columbia

UNITED STATES ON RELATION OF EMIL L. Krushnic, appellant vs. ROY O. WEST, AS SECRETARY OF THE Interior	No. 4823

January term 1929

Judgment

January 7, 1929

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and ad-

judged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

Per Mr. Justice Van Orsdel.

63 In Court of Appeals of the District of Columbia

[Title omitted.]

Designation of record

Filed February 27, 1929

The clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.
4. Judgment or decree.
5. This designation.
6. Clerk's certificate.

O. H. Graves,
Assistant to the Solicitor,
Attorney for appellee.

A copy of the foregoing acknowledged this 25th day of February, 1929.

Chas. S. Thomas,
Chester I. Long,
Langdon H. Larwell,
Pete Q. Nyce,
Attorney for Appellant.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed May 13, 1929

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered

that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:]

File No. 34122. District of Columbia, Court of Appeals. Term No. 813. Ray Lyman Wilbur, as Secretary of the Interior, petitioner, vs. United States on relation of Emil L. Krushnic. Petition for writ of certiorari and exhibit thereto. Filed April 5th, 1929. File No. 34122.

○

FILED
APR 5 1929
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1928

ROY O. WEST, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE : 1929

INDEX

	Page
Petition:	
Statement	1
Specifications of error	5
Reasons for granting the writ	6
Brief:	
Opinions below	7
Jurisdiction	7
The question presented	7
The statutes	8
Statement	9
Argument:	
Section 37 of the leasing act of 1920 operated as a withdrawal of the land when locator defaulted in making annual expenditures and cut off his right to repossess and resume assessment work under section 2324, Revised Statutes	9

CITATIONS

Cases:	
Black v. *Elkhorn Mining Company*, 163 U. S. 445	10
Cronburg v. *Hazlett*, 61 L. D. 101	12
Hodgson v. *Midwest Oil Company*, 17 F. (2d.) 71	10
Interstate Oil Corporation and Frank Crittenden, 50 L. D. 262	10
Kinney, E. C., 44 L. D. 580	10
Union Oil Company v. *Smith*, 249 U. S. 337	10
Statutes:	
Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C., Title 30, sec. 193)	8
Revised Statutes, secs. 2324, 2325 (U. S. C., Title 30, secs. 28, 29)	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——

ROY O. WEST, AS SECRETARY OF THE INTERIOR, petitioner

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 7, 1929 (R. 52), reversing the judgment of the Supreme Court of the District of Columbia (R. 39).

STATEMENT

The question presented is whether Section 37 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C., Title 30, Section 193), supersedes as to coal, phosphate, sodium, oil, oil shale,

and gas locations those provisions of Sections 2324 and 2325, Revised Statutes (U. S. C., Title 30, Sections 28, 29), which authorized locators of placer mining claims, in case of default in assessment work during any one year, thereafter but before re-location to resume and complete all necessary work to entitle them to a patent for their claims.

The relator sought by mandamus to compel the Secretary of the Interior to issue a patent.

The petition alleges that on October 1, 1919, the plaintiff and several other citizens located an oil shale placer mining claim known as Spad No. 3, in Garfield County, Colorado. (R. 2.) This claim was one of a group of six known as Spad Placer Claims Nos. 1 to 6, inclusive, adjacent to each other and all owned by the plaintiff and his associates. The plaintiff and his co-locators performed on Spad Placer Claims Nos. 4, 5, and 6 annual labor of the total value of more than $600 for the assessment year 1920, intending, so it is averred, such labor to be for the entire group of six claims. (R. 2.) Thereafter the plaintiff acquired the interest of his co-locators in Spad Claim No. 3, and in 1921 and 1922 expended $100 annually in labor and improvements, further expenditures being later made on the same claim, until in the aggregate it amounted in value to $500. (R. 2.)

On September 25, 1922, plaintiff applied for a patent to Spad Placer Claim No. 3. No other person has attempted to make location of this placer

claim, and no contest to the plaintiff's ownership of the claim has been instituted by anyone, except that after he had filed his application for patent contest proceedings were instituted by officers of the Interior Department before the District Register and Receiver. On hearing of the contest, all of the charges made by the contestants against the claim were disposed of in favor of the plaintiff except the one as to insufficiency of the annual labor on Spad Claim No. 3, for the assessment year 1920 (R. 4), and on this ground alone the Commissioner of the General Land Office held the claim to be null and void. This holding was approved by the Secretary of the Interior. (R. 5.)

The Secretary determined that in the absence of evidence showing the character of the work done on Spad Claims 4, 5, and 6, and its relation to Spad Claim No. 3, no consideration would be given to mere statements of intent that such work on the adjoining claims was intended to include all necessary work for the year 1920 on Spad Claim No. 3, because such contention of the plaintiff is not "considered to be law nor in harmony with the decisions of the Department or the courts." The Secretary found as a fact that the annual labor performed on the claims adjoining Spad Claim No. 3 was not performed with any intent that it was to be a part of a general scheme of development of the claims as a group. (R. 3.) The opinion of the Secretary, which is made a part of the plaintiff's petition, holds that the work done on Spad Claims 4, 5,

and 6 "has not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown that they were made in furtherance, or are a part of a general scheme to develop the claims as a group." (R. 5, 22.)

The plaintiff then applied to the Secretary of the Interior for a rehearing, which was allowed. (R. 5.) Thereafter the Secretary affirmed his previous decision. (R. 36.) The second opinion of the Secretary is to be found at pages 22–36 of the record.

The Secretary of the Interior, in answer to plaintiff's petition, alleged—

(1) That the plaintiff, with the aid of counsel, has been afforded a fair and complete hearing; that as disclosed by plaintiff's petition the decision reached by him was not the result of arbitrary or capricious action, and that it is final, and not reviewable or subject to review or modification by any court. (R. 37.)

(2) The plaintiff's petition discloses that he has failed to maintain his original right to the claim in question in having omitted to perform the necessary labor at the time provided by law, thereby causing the claim to lapse; that in such circumstances the Leasing Act of February 25, 1920, prevented the plaintiff from thereafter reviving and reinstating his original lapsed claim; in effect withdrew the land from operation of the mining laws under which the claim had been initiated and

placed it entirely and wholly under the provisions of the Leasing Act of 1920. (R. 38.)

The Supreme Court of the District of Columbia dismissed the plaintiff's petition, without opinion. (R. 39.) This judgment was reversed by the Court of Appeals of the District of Columbia. (R. 43–52.) The Court of Appeals entered judgment on January 7, 1929, and it is to review this judgment that the writ of certiorari is now sought.

SPECIFICATIONS OF ERROR

I. The Court of Appeals erred in directing the Secretary of the Interior to issue to Krushnic a patent.

II. The Court of Appeals erred in holding that Section 37 of the Leasing Act of 1920 did not supersede Sections 2324 and 2325, Revised Statutes, and take away the right of the locator to resume work after he had defaulted in annual assessment work.

III. The Court of Appeals erred in holding that, under the excepting clause of Section 37 of the Leasing Act of February 25, 1920, the plaintiff had a valid claim to the land in question at the date of the passage of that Act and that it was thereafter maintained by him in compliance with the laws under which the placer claim was initiated, thereby giving to him a vested right to a patent.

IV. The Court of Appeals erred in holding that Section 37 did not restore the land to the public domain upon the happening of the default in an-

nual assessment work and thereafter make it subject to disposition solely under the Leasing Act of 1920.

V. The Court of Appeals erred in holding that the United States is not the owner of the tract involved.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has misconstrued Section 37 of the Leasing Act of 1920 in holding that it did not supersede Sections 2324 and 2325, Revised Statutes, withdraw the land from the public domain, and thereby take away the right of a locator to resume possession and begin work after he has defaulted in annual assessment work.

2. The Court of Appeals has decided questions of law important to the executive departments charged with the administration of public lands, national forests, and naval reserves; and the proper construction of Section 37 of the Leasing Act of February 25, 1920, is fundamental in adjudicating claims arising under the general mining laws. Many claims similar in character to the one involved here and involving thousands of acres of land are awaiting adjudication until final disposition is made of this case. The questions involved are of general importance and substance relating to the construction of statutes which have not been, but should be, settled by this Court, in order that the respective rights of citizens and the United States, in matters relating to the mining laws of the United

States, be properly determined in accordance with the intent of Congress.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS

No opinion was written by the District Court. (R. 39.)

The opinion of the Court of Appeals has not yet been reported, but is in the Record at pages 43–52.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1929. (R. 52.) Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether Section 37 of the Leasing Act of February 25, 1920 (a) took away, upon default in annual assessment work, the right of a locator of an oil shale placer mining claim, initiated under the general mining laws of the United States, to resume possession and perform assessment work to the extent necessary to entitle him to a patent under the initiating statute, and (b) in effect withdrew the lands from private acquisition except in accordance with the Leasing Act of 1920.

THE STATUTES

The relevant provisions of the statutes involved are:

Section 37 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C., Title 30, Section 193):

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.* (Italics ours.)

Section 2324, Revised Statutes (U. S. C., Title 30, Section 28):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such

> failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Section 2325, Revised Statutes (U. S. C., Title 30, Section 29), provides the procedure for obtaining a patent when—

> * * * five hundred dollars' worth of labor has been expended or improvements made upon the claim * * *

by the locator.

STATEMENT

The facts are sufficiently stated in the petition for certiorari.

ARGUMENT

SECTION 37 OF THE LEASING ACT OF 1920 OPERATED AS A WITHDRAWAL OF THE LAND WHEN LOCATOR DEFAULTED IN MAKING ANNUAL EXPENDITURES AND CUT OFF HIS RIGHT TO REPOSSESS AND RESUME ASSESSMENT WORK UNDER SECTION 2324, REVISED STATUTES

Section 2324 authorized citizens to enter upon the public domain, to make discovery of minerals, and upon discovery to make location and perform "not less than one hundred dollars' worth of labor * * * or improvements * * * during each year" until patent issues. It then provides that if the locator shall fail to comply with those conditions, the claim shall be subject to relocation in the same manner as if no location had been made, "provided that the original locators * * * have not

resumed work upon the claim after failure and before such location."

Discovery and location *vest* in the locator an exclusive possessory right in the land under Section 2322, Revised Statutes, but the assessment work is a condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral-land location upon which discovery has been made, *Union Oil Company* v. *Smith,* 249 U. S. 337, 350, and failure thereof by the locator, whether he remained in possession or not, terminated his right to possession and interest in the claim. *Black* v. *Elkhorn Mining Company,* 163 U. S. 445, 450. The right of relocation by others in case of default by the original locator was in effect a penalty imposed by Congress to compel him to be diligent in performing the requisite amount of assessment work upon the claim. However, he still had the right under Section 2324 at any time after default to resume annual assessment work, provided the claim had not been relocated prior to the resumption of work, or that before or during the time of the default the land had not been withdrawn by the United States. *Hodgson* v. *Midwest Oil Company,* 17 F. (2d) 71, 76–77 (Executive order withdrawing mineral lands); *Interstate Oil Corporation* and *Frank Crittenden,* 50 L. D. 262 (Executive order withdrawing mineral lands); *E. C. Kinney,* 44 L. D. 580 (Executive order withdrawing lands for reclamation purposes).

The theory of the rule laid down in those cases is that the right of the original locator to repossess the land and resume work after he has defaulted in annual assessment work is a matter of *grace*, subject always to termination by the United States, as by withdrawing the land from the public domain.

By the Leasing Act of February 25, 1920, Congress established an entirely new policy in dealing with certain classes of mineral lands including oil shale. Where under the old mining laws a citizen had the right to enter at will upon the public domain and make discovery and location leading ultimately to the acquisition of title to the mineral land, he must now, under the Leasing Act, first obtain a permit to explore a specified area, and upon discovery becomes entitled to a lease to operate it, provided he has fulfilled the other conditions prescribed by the Act.

Another important feature is that the new Act provided that the United States should derive revenue and other benefits from the public lands containing minerals of the character described in the Act, including oil shale. In other words, it cut off private acquisition in fee of such mineral lands.

The decision of the Court of Appeals is not in harmony with the purpose of Congress as expressed in the Leasing Act of 1920. The decision in effect grants to a locator in default in annual assessment work a *vested* right as against the United States to repossess the land *at any time* and resume work

thereon. The practical effect is to allow the locator to reenter the land and resume work at his pleasure and thus indefinitely postpone the completion of work necessary to the issuance of patent. This would operate to deprive the United States of revenue and other benefits contemplated by the Leasing Act of 1920. Moreover, the locator in such circumstances is placed in a position even better than before the passage of that Act, for the reason that the Leasing Act prohibits the location of mineral claims and the private acquisition in fee of mineral lands, thus removing the penalty of relocation by others imposed upon an original locator by Section 2324 in case of his failure to perform the annual assessment work. The Court of Appeals did not consider this situation to be of importance. (R. 46.)

It is manifest that the result flowing from this decision was never intended by the Leasing Act of 1920. Congress undoubtedly intended by that Act to preserve all *vested* rights that had accrued under the earlier statutes and nothing more. The logical interpretation to be given the excepting clause of section 37 in order to carry out the real intent of Congress is that a valid claim is being "maintained in compliance with the laws under which" it was initiated only when the original locator continues faithfully to perform the conditions subsequent prescribed in the initiating statute relative to annual assessment work. It is upon this theory that in *Cronberg* v. *Hazlett*, 51 L. D. 101, it was

ruled that Section 37 of the Leasing Act of February 25, 1920, operated as a continual withdrawal and that a locator thereafter defaulting in his annual assessment work lost the right to repossess the land and resume work upon the claim.

If the decision of the Court of Appeals is allowed to stand unreversed, a vast quantity of mineral lands will be held in possession of original locators at their pleasure and the United States will be deprived of revenue and other benefits to which it is entitled under the Leasing Act of 1920.

In view of this, and of the need for a definite rule of construction of the statute in question for the guidance of the Executive departments charged with the administration of the Acts relating to mineral lands, it is respectfully submitted that the petition for certiorari should be granted in this case.

WILLIAM D. MITCHELL,
Attorney General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

E. C. FINNEY,
Solicitor, Department of the Interior.

RANDOLPH S. COLLINS,
Attorney.

APRIL, 1929.

○

FILED
NOV 19 192
CHARLES ELMORE C
CLE

FILE COPY

No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1929

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	9
Summary of argument	10
Argument:	
I. Mandamus is not a proper remedy	13
II. The decision of the Secretary was correct	31
Conclusion	41

CITATIONS

Cases:	
Alaska Smokeless Coal Co. v. *Lane*, 250 U. S. 549	18
Ballinger v. *U. S. ex rel. Frost*, 216 U. S. 240	29, 30
Barklage v. *Russell*, 29 L. D. 401	15
Belk v. *Meagher*, 104 U. S. 279	22, 23, 24
Benson Mining Co. v. *Alta Mining Co.*, 145 U. S. 428	28
Black v. *Elkhorn Mining Co.*, 163 U. S. 445	25, 28
Cameron v. *United States*, 252 U. S. 450	28
Cole v. *Ralph*, 252 U. S. 286	26, 34, 35
Cronberg v. *Hazlett*, 51 L. D. 101	19, 33
Deffeback v. *Hawke*, 115 U. S. 392	40
El Paso Brick Co. v. *McKnight*, 233 U. S. 250	34
Farrell v. *Lockhart*, 210 U. S. 142	25
Farnsworth v. *Minn. & Pac. R. R. Co.*, 92 U. S. 49	39
Frisbie v. *Whitney*, 9 Wall. 187	28, 29
Gwillim v. *Donnellan*, 115 U. S. 45	26, 33
Hall v. *Payne*, 254 U. S. 343	18
Hayes v. *Lavagnino*, 17 Utah, 185	37
Hodgson v. *Midwest Oil Co.*, 17 F. (2d) 71	20, 37
Honaker v. *Martin*, 11 Mont. 91	27
Interstate Oil Corporation and Frank O. Chittenden, 50 L. D. 262	15, 18
Jupiter Mining Co. v. *Bodie Consolidated Mining Co.*, 11 Fed. 666	37
Kinney, E. C., 44 L. D. 580	15, 18
Knowlton v. *Moore*, 178 U. S. 41	38

Cases—Continued. Page

Lavagnino v. *Uhling*, 198 U. S. 443 32
Little Gunnell Co. v. *Kimber*, 15 Fed. Cases No. 8402, p. 629 26
Marbury Lode Mining Claim, 30 L. D. 202 15
McMicken v. *United States*, 97 U. S. 204 39
McMillen v. *Ferrum Mining Co.*, 197 U. S. 343 37
Ness v. *Fisher*, 223 U. S. 683 18
Nevada-Sierra Oil Co. v. *Home Oil Co.*, 98 Fed. 673 37
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316 18
Roberts v. *United States*, 176 U. S. 221 29
Russian-American Packing Co. v. *United States*, 199 U. S. 570 29
Schulenberg v. *Harriman*, 21 Wall. 44 39
Shiver v. *United States*, 159 U. S. 491 29
Sparks v. *Pierce*, 115 U. S. 408 40
Swanson v. *Kettler*, 17 Ida. 321, affd., *Swanson* v. *Sears*, 224 U. S. 180 ..... 26, 27, 33
Thorn v. *Browne*, 257 Fed. 519 34
Union Oil Co. v. *Smith*, 249 U. S. 337 ..... 26, 34
U. S. ex rel. Dunlap v. *Black*, 128 U. S. 40 ..... 18, 29
U. S. ex rel. Miller v. *Raum*, 135 U. S. 200 18
United States v. *Repentigny*, 5 Wall. 211 39
West v. *Standard Oil Co.*, 278 U. S. 200 16
Wolenberg, In re, 29 L. D. 302 15
Work v. *Braffett*, 276 U. S. 560 ..... 14, 16, 40
Yosemite Valley Case, The, 15 Wall. 77 29

Statutes:

Act of July 2, 1898, ch. 563, sec. 1, 30 Stat. 651 27
Reclamation act of June 17, 1902, ch. 1093, 32 Stat. 388 18
Act of June 25, 1910, ch. 421, 36 Stat. 847 ..... 18, 35
Mineral leasing act of February 25, 1920, ch. 85, sec. 37, 41 Stat. 437, 451 (U. S. C., Title 30, sec. 193) 2–3
Revised statutes—
Sec. 2324 (U. S. C., Title 30, sec. 28) 3, 19, 32, 34
Sec. 2325 (U. S. C., Title 30, sec. 29) 3, 28

Miscellaneous:

Lindley on Mines, vol. 2 (3d ed.)—
Sec. 408, pp. 952–958 36
Sec. 409, pp. 958, 959 37
Sec. 624, p. 1531 15
Sec. 644, p. 1603 36
Sec. 652, pp. 1633–1639 36
General Mining Regulations of March 29, 1909, par. 55 (37 L. D. 769) 15
Cong. Rec., vol. 58, pt. 5, 66th Cong., 1st sess., pp. 4577–4585 35
Instructions of January 13, 1904, 32 L. D. 387 15
U. S. C. A., Title 30, sec. 28, notes 377, 379, pp. 211, 212 36

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, petitioner

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 31.)

The opinion of the Court of Appeals (R. 34) is reported in 30 F. (2d) 742.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1929. (R. 43.) Petition for certiorari was filed April 5, 1929, and granted May 13, 1929. (R. 44.) The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether, on the record in this case, mandamus lies against the Secretary of the Interior to compel him to execute and deliver to respondent a patent in fee to the land herein involved; and

(2) Whether upon default by a locator of an oil-shale placer mining claim in the performance of annual assessment work required for the year 1920, under Section 2324 of the Revised Statutes, Section 37 of the Mineral Leasing Act of February 25, 1920, saves to such defaulting locator any right to resume possession of said claim after such default and perform assessment work thereon to the extent necessary under the general mining laws to entitle a locator to a patent.

STATUTES INVOLVED

The relevant provisions of the statutes involved are:

Section 37 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C. Title 30, Section 193):

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining op-

> erations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.* (Italics ours.)

Section 2324, Revised Statutes (U. S. C. Title 30, Section 28):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Section 2325, Revised Statutes (U. S. C. Title 30, Section 29), provides the procedure for obtaining a patent when—

> * * * five hundred dollars' worth of labor has been expended or improvements made upon the claim * * *

by the locator.

STATEMENT

On March 30, 1928, respondent, as plaintiff, filed in the Supreme Court of the District of Columbia his petition for a writ of mandamus against a predecessor in office of petitioner as Secretary of the Interior, in order to compel the issuance by the said Secretary of the Interior of a patent to certain oil shale land in Garfield County, Colorado, described as the north half of the north half of section twelve in township five south, of range ninety-six west of the sixth principal meridian. (R. 1–5.) Rule to show cause was issued and Hubert Work, then Secretary of the Interior, filed his response thereto. (R. 30–31.) After hearing of the response, the court discharged the rule to show cause and dismissed the petition. (R. 31.) On January 7, 1929, this judgment was reversed by the Court of Appeals of the District of Columbia and the case remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of the said Court of Appeals. (R. 43.)

The petition for the writ of mandamus alleges that on October 1, 1919, the plaintiff and seven other citizens of the United States, each qualified under the law in relation thereto to locate placer mining claims, located the said north half of the north half of section twelve in township five south, of range ninety-six west, as the Spad No. 3 placer claim; that at the time of such location the said land was

a part of the public lands of the United States subject to appropriation under the mining laws of the United States for the valuable deposits of oil shale therein and not otherwise appropriated or reserved under the laws of the United States. (R. 1.) The Spad No. 3 was one of a group of six claims known as Spad placer claims Nos. 1 to 6, inclusive, adjacent to each other and all owned by plaintiff and his associates. The plaintiff and his colocators performed on the Spad placer claims Nos. 4, 5, and 6 annual labor of the total value of more than $600 for the assessment year 1920, ending June 30, 1921, intending, so it is averred, such labor to be for the entire group of six claims. (R. 1, 2.) Thereafter the plaintiff acquired the interest of his colocators in Spad claim No. 3, and during the assessment year 1921, ending June 30, 1922, performed labor and made improvements on the Spad No. 3 claim of the value of more than $100, further expenditures being made in labor and improvement thereafter upon Spad No. 3 claim of the required amount of $100 annually until the total aggregate value of such labor and improvement exceeded the sum of $500. (R. 2.) On September 25, 1922, plaintiff applied for a patent to the Spad placer claim No. 3. No other person had attempted to make location of this placer claim, and no contest or claim adverse to the plaintiff's claim had been instituted by anyone, except that after he had filed his application for patent adverse proceedings were instituted by

the Commissioner of the General Land Office before the district register and receiver. On hearing of the contest proceedings, all of the charges against the claim were either withdrawn or else dismissed, except a charge alleging the insufficiency of the annual labor for the assessment year 1920. (R. 2, 3.) On review of the record of proceedings, the Commissioner of the General Land Office held the claim to be null and void for the reason that the annual labor was insufficient for the assessment year 1920. This holding was approved by the Secretary of the Interior in a decision rendered October 3, 1927. (R. 3, 4.)

The opinion of the Secretary, which is made a part of the plaintiff's petition, holds that improvements on Spad claims 4, 5, and 6 had "not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown that they were made in furtherance or are a part of a general scheme to develop the claims as a group" (R. 17, 18); that "in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the

leasing act" (R. 8). The Secretary determined that the claimants were in default as to performance of assessment work on the Spad placer claim No. 3 for the year 1920, and that the claim thereby lapsed and that the resumption of work thereafter would not restore a lost estate. (R. 9.)

The plaintiff then applied to the Secretary for a rehearing, which was allowed. On February 8, 1928, the Secretary affirmed his previous decision. The second opinion, also made a part of plaintiff's petition, is to be found at pages 18–29 of the Record. Therein the Secretary, although conceding that the Spad No. 3 claim appeared to be a valid existing claim on February 25, 1920, the date the Leasing Act became effective, adverted to the admission of plaintiff that no work had been done or improvement made on that claim prior to July 1, 1921, and to his insistence that the assessment work performed during the assessment year 1920 on the adjacent claims of the group was properly creditable as acceptable expenditure for the Spad No. 3 claim for 1920 (R. 19), and refused to disturb his previous finding that such work was not performed with any intent that it was to be a part of any general scheme of development of the claims as a group (R. 20). With respect to the right of resumption of work after a default in its performance subsequent to the passage of the Leasing Act, the Department held that in view of the provisions of Section 37 thereof—

> When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights *against the Government* in and to this location upon oil-shale lands were extinguished, and this claimant, who acquired the outstanding interest of the other locators and proceeded thereafter to reenter and perform work on the land that was no longer subject to the general mining laws, was no more than a trespasser, and could neither revive nor initiate any rights to the land thereby. (R. 22.) (Italics ours.)

The Secretary of the Interior, in answer to plaintiff's petition, alleged—

(1) That the plaintiff, with the aid of counsel, has been afforded a fair and complete hearing; that as disclosed by plaintiff's petition the decision reached by him was not the result of arbitrary or capricious action, and that it is final, and not reviewable or subject to review or modification by any court. (R. 30.)

(2) The plaintiff's petition discloses that he has failed to maintain his original right to the claim in question in having omitted to perform the necessary labor at the time provided by law, thereby causing the claim to lapse; that in such circumstances the Leasing Act of February 25, 1920, prevented the plaintiff from thereafter reviving and reinstating his original lapsed claim; in effect withdrew the land from operation of the mining laws

under which the claim had been initiated and placed it entirely and wholly under the provisions of the Leasing Act of 1920. (R. 30–31.)

SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Appeals erred in reversing with costs the judgment of the Supreme Court of the District of Columbia in this cause and, in effect, directing that a writ of mandamus should issue against the Secretary of the Interior.

II. The Court of Appeals erred in holding that Section 37 of the Mineral Leasing Act of 1920 did not supersede Sections 2324 and 2325, Revised Statutes, and take away the right of the locator to resume work after he had defaulted in annual assessment work.

III. The Court of Appeals erred in holding that, under the excepting clause of Section 37 of the Mineral Leasing Act of February 25, 1920, the plaintiff had a valid claim to the land in question at the date of the passage of that Act and that it was thereafter maintained by him in compliance with the laws under which the claim was initiated, thereby giving to him a vested right to a patent.

IV. The Court of Appeals erred in holding that Section 2324 did not restore the land to the public domain upon the happening of the default in annual assessment work and thereafter make it subject to disposition solely under the Leasing Act of 1920.

V. The Court of Appeals erred in holding that the United States is not the owner of the tract involved.

SUMMARY OF ARGUMENT

As to the question whether the facts exhibited present a case for mandamus of the Secretary of the Interior, compelling him to issue a patent to respondent, it is contended by petitioner that the Act of February 25, 1920, radically changed the law as to the mode of disposition of oil shale and other mineral deposits belonging to the United States and mentioned in the first section thereof; that Section 37 of said Act prescribed the conditions under which a mining claim theretofore initiated under the mining laws for such deposits is excepted from the operation of said Act and may be perfected and patented; that as the application of respondent is one for a patent to the claim under the general mining law, the Secretary of the Interior, in determining whether such claim is one that may be patented, must necessarily ascertain whether the facts presented in such application bring the claim within the exceptions of Section 37; that as Section 37 excepts only "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery," these provisions require interpretation and construction as to their meaning and effect and involve the exercise of judgment and

discretion on the part of the Secretary; that such judgment and discretion exercised in denying the patent to respondent was not arbitrary or capricious or beyond the scope of the authority of the Secretary, but on the contrary is in accord with previous rulings and regulations of the Department of the Interior and not in conflict with any decision of this Court; that the decision did not disturb vested rights of the respondent. For the reasons stated, the decision of the Secretary, rejecting the application of respondent and declaring his claim null and void, is not reviewable on a direct proceeding by mandamus.

The default of the locators in not performing the required annual assessment work on the Spad No. 3 claim for the assessment year 1920, terminated the rights of the claimants thereof by operation of law; the privilege of resumption of work by the claimants or their successor in interest was cut off by the Leasing Act. The action of the Secretary of the Interior was therefore correct in denying the respondent's application for a patent to the Spad No. 3 claim, and in declaring the claim null and void. The privilege of relocation accorded by Section 2324, Revised Statutes, is irreconcilable with the provisions of Section 37 of the Leasing Act, and was consequently withdrawn; and so also was the privilege of resumption of work by a defaulting locator, for the legal effect of resumption of work is to reinstate a lost right of possession, unless the

privilege of resumption was saved by the exceptions in Section 37 thereof. The privilege of resumption was not saved, because the obligation to *maintain* the claim therein prescribed refers primarily to the mandatory statutory duty laid upon the locator to perform the annual assessment work in the manner and within the periods prescribed. The mining law protected the right to the possession of a claim validated by discovery so long as the annual assessment work was kept up; it likewise protected the *pedis possessio* of a claimant in search for minerals so long as his actual possession and search was kept up against forcible, fraudulent, and clandestine intrusions of others.

To construe Section 37 as saving the privilege of resumption of work after default, would be to disregard the spirit and intent of the Leasing Act, as it would greatly extend the privileges afforded a defaulting locator under the mining law by rendering his claim immune from successful assault by either private claimant or by the Government, except upon establishment of an intent to abandon the claim no matter how delinquent the locator had been in the performance of assessment work. It would recognize a superior right of a defaulting locator over strangers who might desire to locate the claim, while the mining law made the superior right depend, where default occurred, upon priority of possession for the purpose of mineral development. It would render the Leasing Act difficult if not impossible of proper and successful

administration as to oil shale, due to the uncertainty as to what lands were subject to its operation, and would be prejudicial to the public interest by transferring the title of all oil shale lands, where the essential acts of mere location had been performed, to private parties and thus deprive the Government of contemplated rents and royalties from operations under the Leasing Act. No declaration or adjudication of forfeiture is necessary; the claim upon breach of the condition necessary to maintain the possessory right *ipso facto* ceases to exist.

ARGUMENT

I

MANDAMUS IS NOT A PROPER REMEDY

The writ of mandamus does not lie, because the Secretary of the Interior in denying the respondent a patent (1) acted within the scope of his authority; and (2) his action was neither arbitrary nor capricious, for (*a*) it was in harmony with previous decisions and regulations of the Department of the Interior governing the same state of facts, and with the decisions of the courts, and (*b*) it disturbed no vested rights of the respondent.

(1) The Secretary acted within the scope of his authority when he held that the failure of the locators of the Spad No. 3 claim to perform the annual assessment work required by Section 2324, Revised Statutes, for the year 1920, terminated the rights of the respondent under the provisions of Section 37 of the Leasing Act of

February 25, 1920. That Act established an entirely new policy in its mode of disposition of oil shale and certain other mineral deposits upon the public lands. Prior to its passage, under the general mining laws, a citizen had the right to enter at will upon the unoccupied public domain, make a discovery and location and take therefrom the ores without rendering any account to the Government, and, at his option, upon the expenditure of a specified sum in labor or improvement, obtain a patent for the land at a nominal price per acre. Under the Leasing Act, exploitation is permitted only by leasing the land, the lessee being required to pay rents and royalties to the Government. Under Section 37 of said Act, such mode of disposition is exclusive, "except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

After the Leasing Act was passed, respondent sought a patent under the mining laws for land containing oil shale deposits. His application was not entitled to consideration unless saved by the exception in Section 37. *Work* v. *Braffet*, 276 U. S. 560, 564.

It was established to the satisfaction of the Secretary in the proceedings before him, challenging the validity of the claim, in which respondent was given full opportunity to be heard, that no assessment work was performed on or for the benefit of

the Spad No. 3 claim for the assessment year 1920. Thereby, there was presented to the Secretary the question whether the claim had been "maintained in compliance with the laws under which initiated."

Under Section 37, the preexisting authority of the Secretary to issue patents under the mining laws was circumscribed as to oil shale claims. That section by necessary implication imposed an additional specific duty upon the Secretary to inquire and determine whether the claim was one that had been maintained after the passage of the Leasing Act in compliance with the mining laws. Such maintenance was a condition of the exception. This was an inquiry that theretofore had been held of no concern to the Government and to involve a question solely arising in controversies between rival claimants and exclusively within the jurisdiction of the courts; Lindley on Mines (3d Ed.) Vol. 2, p. 1531, and cases there cited; General Mining Regulations of March 29, 1909, Par. 55 (37 L. D. 769); *Barklage* v. *Russell,* 29 L. D. 401, 402; *In re Wolenberg,* 29 L. D. 302, 304; *Marburg Lode Mining Claim,* 30 L. D. 202, 208, except where the claim involved was within the limits of a subsequent withdrawal or reservation for public purposes; Instructions of January 13, 1904, 32 L. D. 387; *E. C. Kinney,* 44 L. D. 580; *Interstate Oil Corporation and Frank O. Chittenden,* 50 L. D. 262. There was thus conferred upon the Secretary the authority to

inquire as to the continued maintenance of the possessory right to the claim. He could not well determine this inquiry without construing Section 37 as to what was meant by "thereafter maintained in compliance with the laws under which initiated." This Court has repeatedly held that where by the terms of an Act, the Secretary is required, upon application of the claimant, to issue a patent or other certificate of title, Congress by implication confers upon the Secretary power to make all determinations *of law* as well as of fact which are essential to the performance of the duty specifically imposed. In making such determinations "he acts as a special tribunal with judicial functions." See *West* v. *Standard Oil Co.*, 278 U. S. 200, 218–220, and cases there cited. Section 37 was in need of construction to determine its purpose. This Court in *Work* v. *Braffet, supra,* plainly intimated that this section was in need of construction by resort to extrinsic sources of information, for, on page 566, it said:

> The reference in Section 37 to valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery" at least suggests that they embrace only such substantial claims as would on compliance with the provisions of the *former* law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development which, if continued to discovery and entry, would entitle the claimant to a patent.

That such was the purpose is established by the Congressional debates. 56 Cong. Rec. pt. 5, pp. 4577–4585, 66 Cong., 1st sess. (Italics ours.)

The construction of the Act by the Secretary involved the exercise of judgment and discretion, the exercise of judicial functions. The saving clause of Section 37 is in general terms; it does not definitely or clearly state the specific facts and circumstances under which a claim would be saved under its provisions. As a prerequisite to the issuance of a patent the Secretary must determine a question of law—namely, what acts constitute maintenance in compliance with the laws under which the claim was initiated; or putting it concretely with reference to the instant case: Was a valid claim, existent on February 25, 1920, "thereafter maintained in compliance with the laws under which initiated," within the import of that language and the intention of Congress, if the claimant failed to make any improvements or do any work on such claim before July 1, 1921, but did later perform sufficient work to entitle him to a patent, if his prior default did not, under Section 37, terminate his claim? That the Secretary's construction of the statute was not only a reasonable construction, but one impelled by its terms, will hereinafter be argued in the discussion as to whether he erred in its construction. In resistance to the writ of mandamus it is believed sufficient to show that the de-

cision of the Secretary was not in apparent defiance of law, nor arbitrary or capricious, but within the scope of the administrative duty confided to him. *Hall* v. *Payne,* 254 U. S. 343, 347; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325; *Ness* v. *Fisher,* 223 U. S. 683, 692–694; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40; *United States ex rel. Miller* v. *Raum,* 135 U. S. 200.

(2) (*a*) The decision was not arbitrary or capricious, for the decision of the Secretary was in accord with previous rulings of the Department. It had been held that a mining claim as to which claimant was in default in the performance of annual assessment work at the date of the withdrawal for the construction of irrigation works under the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, does not except the land from the force and effect of the withdrawal, *E. C. Kinney, supra;* that a withdrawal under the Act of June 25, 1910, c. 421, 36 Stat. 847, is in the nature of a continuing withdrawal, which, although not attaching to land which at the date of the withdrawal was within a valid existing oil placer mining claim, attaches immediately upon the default of the claimant in the performance of assessment work, and although there had been an expenditure of more than the law required as a prerequisite to the grant of a patent, the application for patent must be denied. *Interstate Oil Corporation and Frank O. Chittenden, supra.* In the case

of *Cronberg* v. *Hazlett*, 51 L. D. 101, being the first case involving the construction of Section 37 in its bearings on default in the performance of assessment work on a mining claim, it was held that an oil and gas mining location, unperfected at the date of the Leasing Act, can not be perfected pursuant to the excepting clause in Section 37 of that Act, unless the requirements of Section 2324, Revised Statutes, relating to the performance of annual assessment work are thereafter fulfilled. Also, in the reprint of the mining regulations subsequent to the passage of the Leasing Act, there is affixed this headnote (49 L. D. 58):

> In view of the repealing provisions of the potash act of October 2, 1917 (40 Stat. 297), and the leasing act of February 25, 1920 (41 Stat. 437), the following regulations are not applicable to deposits of potash, oil, oil shale, gas, phosphate or sodium, except as to valid claims existent at date of such repeal and thereafter duly maintained pursuant to the law under which located.

This shows a clear recognition by the Department of the limitations of the applicability of such regulations to claims for the deposits enumerated in the headnote.

We do not find any reported decision of the courts prior to the rendition of the decision by the Secretary with respect to the claim here involved where consideration was given to the effect of the failure to perform annual assessment work subsequent to the passage of the Leasing Act on

mining claims located for the minerals within the purview of that Act. The case of *Hodgson* v. *Midwest Oil Co.*, 17 F. (2d) 71, decided by the Circuit Court of Appeals, Eighth Circuit, is in line with the above-stated views of the Department, as to the effect of such failure on oil placer claims which before such failure were embraced in a petroleum withdrawal. In that case the action was one in ejectment. The defendant demurred to the petition. The court adverted to the absence of a showing in the petition of performance of assessment work during the interval from January 1, 1921, to July 1, 1922, the period fixed for the doing of assessment work for 1921, and held that the implication was that no such work was performed in that year. It held the allegations of ouster by defendants during 1921 were not such as to constitute any justification for not doing the work in that year, stating (p. 77):

> Now, it seems to us clear that, if an adequate legal excuse for not doing the assessment work or making the improvements is not stated in the petition, then the plaintiff has failed to state a cause of action in ejectment, for it is well settled that a failure to do the work or have an adequate legal excuse automatically terminates the locator's right of possession, and in the instant case would have terminated before the commencement of the action.

Notwithstanding the opinion of the court below to the contrary, it is submitted that the vital

question in the *Hodgson Case* was whether it was essential for the plaintiff in order to show a possessory right that would sustain a complaint in ejectment to allege the continuous performance of assessment work to the date of hostile entry by a claimant under the Leasing Act, to prevent the petroleum withdrawal of 1909 from defeating his claim.

The decision of the Secretary in the case at bar can hardly be characterized as arbitrary or capricious when it was in accord with the four last-cited previous decisions, unless it had the effect of disturbing vested rights of the respondent, a question now to be discussed.

(2) (*b*) The Secretary's decision disturbed no vested right of respondent. Under the general mining law, apart from the change wrought by the Mineral Leasing Act of 1920, at the moment the locators of a claim were in default in the performance of assessment work, the land included therein became open public mineral lands of the United States subject to relocation and purchase by others. The exclusive right of possession and enjoyment of the locators *ipso facto* ceased to exist. It was contended by respondent in the court below (Brief, p. 42), "that the mere nonperformance of assessment work within the assessment year does not in and of itself *have any effect whatsoever* upon the mining claim on which such default in annual labor is made, but, on the contrary, that such mining claim *continues in all its original vigor* up to the instant of relocation by a third party; that it is the re-

location during the period of default, and not the mere default itself which terminates the *estate* of the original locator." (Italics ours.) These deductions as to the character of the locator's estate after default appear to be made from certain language used by this Court in the case of *Belk* v. *Meagher*, 104 U. S. 279, 283, and certain courts of the mining States in suits dealing with the rights of rival mining claimants to the same tract of land, and where the occurrence of the default by the original locator was considered solely from the standpoint of its effect in depriving him of his rights under the mining laws in favor of third parties, consideration of its effect upon his relations with the Government, the paramount proprietor of the land, not being involved.

We submit that respondent's theory as to the nature of the estate after default in the performance of assessment work, if by estate is meant the exclusive right of possession, is not sustained by the opinion in *Belk* v. *Meagher*, and is incompatible with numerous opinions of this Court and of other eminent authorities on the mining law. Furthermore, this theory would seem to involve the consequence that while the Government could after the default clothe a third party with the right to divest the locator's estate, it could not of itself by legislation directly divest it.

This Court in *Belk* v. *Meagher*, *supra*, p. 283, said:

> The language of the act is that the locators "shall have the exclusive right of possession

> and enjoyment of all the surface included within the lines of their locations," *which is to continue until there shall be a failure* to do the requisite amount of work *within the prescribed time.* (Italics ours.)

And again (p. 284):

> Mining claims are not open to relocation until the rights of a former locator have come to an end.

As to the character of the locator's rights prior to the occurrence of a default, the Court said:

> On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or preemption entry.

There is no room for a valid deduction from this opinion that the mere default had no effect on the locator's estate and that his right of possession was not terminated by the default.

The fallacy in the argument of the respondent is that he attributes the same dignity to the estate of the locator upon the happening of the default as it had before. The well-established doctrine that *after resumption* of work and before another enters, the rights of the locator stand as they would if no default had occurred is radically different from the contention made by respondent that *after default* the locator's rights stand as they were before,

until and unless another relocates. This contention makes the termination of the possessory right of the original locator dependent upon the act of a third party, whereas the possessory right terminates as a result of the delinquency of the original locator. As this Court stated in *Belk* v. *Meagher,* the land is not open to location until the rights of the original locator have come to an end. If it were otherwise, a relocation by another during the period of default would constitute a trespass. Manifestly, the contention that the construction of Section 37 by the Secretary would disturb vested or valuable property rights of respondent must be grounded on the proposition that a mere default of the original locators in the performance of assessment work effects no change in the character of the interest of the original locators in the claim, for the question here presented is not, what was the character of the interest of the locators before such default, nor what would be the character of the interest of the locators after resumption of work if the Leasing Act is put out of view, but what was the character of the interest of the locators under the general mining law when the default in the performance of annual labor occurred.

The answer is, the land was open public domain, subject to location and purchase under the mining laws by another; the possessory right of the original locators had come to an end and all that remained to them was the privilege of resuming work

before another entered and thereby the delinquency would be condoned, and the right of possession restored.

The proposition that the possessory right terminates upon the happening of the default has been repeatedly affirmed in an unbroken line of decisions by this Court and by eminent judicial authority in the mineral land States. We quote from but a few of those frequently cited.

In *Black* v. *Elkhorn Mining Company,* 163 U. S. 445, 450, this Court said:

> The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.

And again:

> This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work * * *.

And again:

> If the locator remained in possession and failed to do the work provided for by statute his interest would terminate * * *.

This statement of the Court was quoted and approved in *Farrell* v. *Lockhart,* 210 U. S. 142, 148.

In *Union Oil Company* v. *Smith*, 249 U. S. 337, 349, this Court said:

> Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor required by Section 2324. *Belk* v. *Meagher*, 104 U. S. 279, 283, 284; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Farrell* v. *Lockhart*, 210 U. S. 142, 147; *Bradford* v. *Morrison*, 212 U. S. 389, 394.

The doing of "assessment work" was stated to be "the condition subsequent prescribed by Congress to be performed in order *to preserve the exclusive right to the possession of a valid mineral land location* upon which discovery had been made" (p. 350). (Italics ours.)

In *Cole* v. *Ralph*, 252 U. S. 286, 295, the Court said:

> A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and *so long as it is kept alive by performance of the required annual assessment work* prevents any adverse location of the land. (Italics ours.)

citing *Gwillim* v. *Donnellan*, 115 U. S. 45, 49; *Swanson* v. *Sears*, 224 U. S. 180.

In *Little Gunnell Co.* v. *Kimber*, 15 Fed. Cases, No. 8402, pages 629, 630, the court said:

> Although this work may not have been done within the time fixed by law, the original locator or claimant may resume work, *and thus regain his first estate,* at any time before another has taken possession of the property with intent to relocate it. (Italics ours.)

In *Swanson* v. *Kettler,* 17 Ida. 321, affirmed under the title of *Swanson* v. *Sears,* 224 U. S. 180, the court said (p. 336):

> If, however, such area in conflict became abandoned or forfeited under the Emma No. 2 location, it would not become a part of Independence No. 2, although within the surface boundaries thereof, *but would revert to the public domain* and would be subject to relocation by any one who desired to locate the same. The inchoate title and right of possession acquired by the senior locator *would revert to the United States, the owner of the fee,* by *operation of law;* and another claimant must acquire his rights from the owner of the fee. (Italics ours.)

In *Honaker* v. *Martin,* 11 Mont. 91, 97, the court said:

> Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government.

Cf. also Section 1 of the Act of July 2, 1898, c. 563, 30 Stat. 651.

At no time prior to the happening of such default had the locators any vested right of purchase or claim to a patent. The expenditures required by Section 2325, Revised Statutes, as a prerequisite to the grant of a patent had not been made. The rule is well settled that until the claimant does some act toward paying the purchase money he obtains no vested right of purchase or claim to a patent. *Benson Mining & Smelting Co.* v. *Alta Mining and Smelting Co.,* 145 U. S. 428; *Black* v. *Elkhorn Mining Co., supra.*

There could not be any serious question as to the authority of Congress to withdraw the permission to resume work and its offer to sell the land under well-settled rules of this Court. In *Cameron* v. *United States,* 252 U. S. 450, 460, the Court said:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims.

As to claims made under the homestead and kindred laws it has been long settled that until the inchoate rights of such claimants become vested by the payment of the purchase money and perfection of all steps entitling them to a patent, title to the land is in the United States, and Congress can withdraw it from preemption and sale and dispose of it to another. *Frisbie* v. *Whitney,* 9 Wall.

187; *The Yosemite Valley Case,* 15 Wall. 77, 89, 91; *Shiver* v. *United States,* 159 U. S. 491; *Russian-American Packing Co.* v. *United States,* 199 U. S. 570, 577, 578. If then it is competent for Congress to cut off the rights of such claimants to their exclusive possession even though they had complied with the laws under which their claims had been initiated, *a fortiori,* Congress had power to cut off any rights of claimants under the mining law to resume work where they had defaulted in compliance with the applicable law and under such law had lost their right of possession.

No analogy is perceived between the facts in this case and those in *Roberts* v. *United States,* 176 U. S. 221, and *Ballinger* v. *United States ex rel. Frost,* 216 U. S. 240, cited by the Court of Appeals in this case. In the *Roberts case* an Act of Congress specifically directed the Treasurer of the United States to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether the certificates had been redeemed by him within the meaning of that Act. The certificates had been redeemed. The duty on the Treasurer was plain, imperative, and entirely ministerial. The Court distinguished the facts in that case from those in *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40, where the writ was refused because "the decision which was demanded from the Commissioner of Pensions required of him, in the

performance of his regular duties as commissioner, *the examination of several acts of Congress, their construction and the effect* which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act." (pp. 230, 231.) (Italics ours.) The duties imposed upon the Commissioner in the *Black case* are precisely of the same nature as those which were imposed upon the Secretary of the Interior upon the presentation of respondent's application for patent; that is, to examine the prior Acts of Congress, construe them, and determine the effect of Section 37 of the Leasing Act upon the previously enacted mining law. The rule in *Ballinger* v. *Frost, supra,* is also plainly inapposite. There the Secretary attempted to set aside the title of an Indian allottee that had become fixed and absolute as provided by the statute.

It is submitted that the construction placed upon Section 37 of the Leasing Act by the Secretary follows the settled rules as to rights of claimants under the mining law, and previous decisions of the Department as to the effect of the Leasing Act as well; that the latter Act conferred upon the Secretary jurisdiction to decide the questions of law involved as well as those of fact, and a writ of mandamus does not lie to review the correctness of his legal conclusions.

II

THE DECISION OF THE SECRETARY WAS CORRECT

The Secretary properly held that upon failure of the locators of the Spad No. 3 oil shale placer claim to perform the required annual assessment work for the assessment year 1920, all right of the locators in and to the claim terminated and the oil shale deposits therein became subject solely to disposition under the Leasing Act, and that the respondent, who is the successor in interest of the locators and the applicant for patent to the claim, by resuming work after such failure neither revived nor initiated any rights under the terms of Section 37 of said Act.

The Secretary properly construed the provisions of Section 37, because (1) he interpreted its language in accordance with its ordinary and well-understood meaning and legal effect, and (2) his construction was in harmony with the policy and purpose of the Act.

It would seem unnecessary to devote any space in this brief to an argument in support of the proposition that subsequent to the passage of the Leasing Act oil shale lands are not subject to relocation under the general mining law, were it not for the insistence of respondent that such proposition is untenable. (See Brief in opposition to the petition for certiorari, p. 7.) The Court of Appeals appears to concede the proposition but holds it has no effect on the right of the original locator to resume work. (R. 40–41.) We contend that it is manifest

from the provisions of Section 37 of the Act that not only are all relocations barred but the right of resumption of work which had the effect of a reinstatement of a lost right is also barred.

The provision in Section 2324, Revised Statutes, that "upon a failure to comply with these conditions [the conditions thereinabove prescribed relative to necessary acts of location and performance of annual labor], the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made" and the provisions of Section 37 of the Leasing Act declaring that oil shale and other minerals there mentioned "shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated" are so plainly repugnant to one another in terms as to render the former nugatory as to oil shale and other minerals affected by the latter. Clearly Section 37 withdrew the privilege of relocation. Under the former law although the original locator's rights failed, the permission given by the United States to locate and purchase remained. Under the present law that permission has been withdrawn. Under well-settled rules a relocation transfers no former rights of the prior locator; it initiates a new right, a new grant from the paramount proprietor, the United States. In *Lavagnino* v. *Uhlig,* 198 U. S. 443, 452, this Court said:

> **It is elementary also that the power conferred by Section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location.**

See also *Swanson* v. *Kettler, supra.*

Section 37 did not except from the operation of the Leasing Act *lands* upon which valid claims existed at the date of its passage, but only valid *claims* then existing and thereafter maintained. It clearly contemplates that if the requirement of maintenance was not fulfilled, the land within the claim should become subject to the operation of the Leasing Act. As heretofore stated by the Department of the Interior in the *Cronberg case, supra,* the Leasing Act operated as a continuing withdrawal.

Unless the claim is saved by Section 37, the Leasing Act automatically withdrew the land from disposition under the mining law. But we think it is plain that the words "thereafter maintained in compliance with the laws under which initiated" refer primarily to the continued performance of assessment work required by such laws for each and every statutory period. That was the only exaction the mining law had prescribed to maintain a claim. Moreover, the frequency with which "maintained" or equivalent expressions, "kept up," "kept alive," "preserved," are encountered in the decisions of this Court (see *Gwillim* v. *Donnellan,* 115 U. S. 45,

48; *Cole* v. *Ralph, supra,* 295; *El Paso Brick Co.* v. *McKnight,* 233 U. S. 250, 256; *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349) in referring to the necessity of the annual assessment work, gave it a well-understood meaning. When a legislative body selects and uses in a statute words or clauses which had acquired by judicial interpretation or common consent and use a well-understood meaning, the legal presumption is they should have that meaning and effect in the statute enacted. *Thorn* v. *Browne,* 257 Fed. 519, 523, and cases there cited.

But, although the Leasing Act continued the obligation to perform annual assessment work required by Section 2324, it does not follow that under the changes brought about by that Act in withdrawing from the operation of the mining law certain minerals, it was intended to continue privileges conferred under Section 2324, particularly so where the perpetuation of such privileges would have the effect of enlarging the rights of claimants under the former law.

The Leasing Act manifests no purpose to confer upon existing claimants under the mining law any greater rights against the Government than they had before against rival claimants. As we have seen, the claimants of a valid claim were protected so long as they complied with the condition of performing the prescribed annual labor, but if they defaulted their claim was subject to appropriation by others. Also, in advance of discovery an ex-

plorer in actual occupancy and in diligent search for mineral on the public domain, was protected from forcible, fraudulent, and clandestine invasions of his possession, but if he relaxed his occupation, or if it was but incidental to something else than the diligent search for mineral, another could enter peaceably but not fraudulently and clandestinely, and make a discovery and valid location. *Cole* v. *Ralph, supra,* p. 295, and cases there cited.

Both classes of claims were regarded as substantial and entitled to protection. It was the latter class of claims which Congress sought to protect when the words "including discovery" were added to the saving clause of Section 37, as the Congressional debates on the leasing bill show. 58 Cong. Rec., pt. 5, pp. 4577–4585, 66th Cong., 1st Sess. Similar protection had been extended to like claimants theretofore on oil-placer claims, in the Act of June 25, 1910, 36 Stat. 847, to protect them from withdrawals made under said Act.

The theory that the right to resume work under Section 2324 is perpetuated by the Leasing Act as to the mineral deposits mentioned in the latter, is opposed to the policy and purpose of the Act.

First, it would take away the penalty of forfeiture by relocation imposed in the same section to counterbalance the privilege of resumption. The practical effect of the recognition that such privilege continues, is to render the estate of the locator terminable only at his will and pleasure no matter how negligent the claimant had been in developing

the land. He could hold the claim against any seeker of rights and grantees under the Leasing Act and against the Government itself, except upon establishment that the claim had been abandoned. Lapse of time, absence from the ground, or failure to work the claim for any definite period, unaccompanied by other circumstances, are not evidences of abandonment. Lindley on Mines (3d Ed.), Vol. 2, p. 1603, and cases there cited.

Second, if the Leasing Act intended that no new rights could be initiated by relocation, it necessarily follows that it did not intend that any lapsed rights should be reinstated. When the land became unsegregated public mineral land by the default of the original locator, Section 2324 did not invest him with any superior right to the land over strangers who might seek to acquire it under the mining law. Section 2324 merely created a race for priority of reentry for the purpose of development. The better right of resumptioner over the relocator depended on whether the former sufficiently resumed before the latter sufficiently relocated, the courts not being in entire accord as to what constitutes sufficiency in the one case or the other, the question being affected by legislation in many States. See cases cited in Lindley on Mines, Section 408, pp. 952–958, and Section 652, pp. 1633–1639; U. S. C. A., Title 30, section 28, notes 377, 379, pp. 211, 212. The only advantage the prior locator had over the relocator was that he could dispense with the initial acts of location. The lat-

ter could adopt the previous discovery of the prior locator. *McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343, 347; *Nevada-Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. 673, 677; *Hayes* v. *Lavagnino*, 17 Utah 185; *Jupiter Mining Co.* v. *Bodie Consolidated Mining Co.*, 11 Fed. 666, 676. And when the estate of the prior locator became extinguished by his failure to comply with the law, the relocator on entry and perfection of his relocation had dominion and control over the property and his appropriation carried the right to the betterments and improvements of the prior locator when they were of the class designated as fixtures. Lindley on Mines, *supra*, Section 409, pp. 958, 959. The statement in *Hodgson* v. *Midwest Oil Co.*, *supra* (p. 77) that "Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate" is justly open to criticism for its inept phrasing, for, as above stated, the prior locator was not obliged to relocate his claim. But the principle therein embodied is sound and is a valid inference from the decisions therein cited, that upon the happening of the default in assessment work, the defaulting locator stands upon an equal footing with any other person qualified to locate as to the right to acquire the exclusive possessory right to the claim, the mode of acquirement merely being different as to him.

Third, to hold that the right to resume work was preserved by the Leasing Act would render its proper administration with respect to lands known to be valuable for oil shale deposits difficult if not impossible. If there can be doubt under the statutes under consideration as to whether right of resumption remains, the inconveniences which such a construction will occasion are proper elements to consider. *Knowlton* v. *Moore,* 178 U. S. 41, 77, and cases there cited.

If the test of validity is not compliance with law, but the existence of an intent to atone for the delinquency, then the status of oil shale lands, whether segregated by mineral location or subject to disposition under the Leasing Act, is thrown into confusion and uncertainty. Extensive search of local land records would be necessary, as the Land Department would have to find and have established whether any location made prior to the Leasing Act had been abandoned. The duty would be imposed to ascertain the whereabouts of many locators or their successors in interest, serve them with process, give them their day in court, and establish that they intended to abandon the claim. Without such preliminaries brought to a successful conclusion, a lessee under a Federal lease for such lands would have no assurance as to the validity of his title or the security of his possession, except from the operation of the rules of estoppel or adverse possession. The construction of the Court of Appeals places the idle, the delinquent, and the neg-

ligent upon the same plane of security and merit as the diligent and law-abiding.

No overt act or judicial inquiry was necessary, after claimants were in default, to terminate their rights. Upon the occurrence of the default, the estate of the locator lapsed and was reunited with the public domain. The locators at no time had either legal or equitable title to the land. Section 37 afforded notice to all such mining claimants of the conditions under which they could maintain their possessory right, and such conditions being broken, the right failed by operation of law. This Court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands that have been forfeited. It was so held in *United States* v. *Repentigny*, 5 Wall 211; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Farnsworth* v. *Minnesota & Pacific Railroad Company*, 92 U. S. 49; *McMicken* v. *United States*, 97 U. S. 204, 217, 218.

Respondent's contention that some overt act by the Government should take place evincing an intent to repossess the land or that some judicial proceeding should be initiated before work was resumed is predicated upon the fallacious premise that the right of resumption of work after default remained after the Leasing Act, and that the Government, therefore, must act the part of a relocator, and get in before the locator gets back.

The entry and improvements made after the default by the respondent in an effort to qualify him to obtain a patent were made in violation of law. He could gain no rights thereby. He, therefore, could set up no equities against the Government by reason thereof. *Deffeback* v. *Hawke,* 115 U. S. 392, 407; *Sparks* v. *Pierce,* 115 U. S. 408, 413.

At page 2 of respondent's brief in opposition to the petition for writ of certiorari, statements are made to the effect that work was performed for the claim but was ineffective, because done in the wrong place. Such statements challenge the conclusions of fact found by the Secretary; his decisions which were made part of respondent's petition for the writ of mandamus, speak for themselves. The Secretary found there was no intent to perform work or make improvements for this claim in 1920. (R. 17, 20.)

Respondent's claim existing on February 25, 1920, was not "thereafter maintained in compliance with the laws," in that respondent defaulted in the performance of the work required by such laws for the year 1920. The passage quoted from *Work* v. *Braffet, supra,* p. 16, defines comprehensively the character of claims that are embraced in the saving clause of Section 37. It is submitted the claim of the respondent is not of the character there described.

CONCLUSION

The Secretary had jurisdiction to determine whether the Spad No. 3 placer claim was of the character embraced in the saving clause of Section 37, and his decision was right; the judgment of the Court of Appeals should be reversed.

CHARLES E. HUGHES, JR.,
Solicitor General.

E. C. FINNEY,
Solicitor, Department of the Interior.

GEORGE C. BUTTE,
Special Assistant to the Attorney General.

NOVEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILED
APR 25 1929
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1928

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT OF RESPONDENT

EAMES BROS., PRINTERS, DENVER

INDEX

Brief:	Page
Opinions below	1
Statement	1–2
Argument:	3–12
Since the passage of the Leasing Act of 1920, as before, the owner of a valid mining claim, who has defaulted in annual labor, has a right to resume annual labor at any time prior to the initiation of a right to the claim by another during the period of default; and such claim may be perfected under Section 37 of the Leasing Act.	

CITATIONS

Cases:	
Belk v. Meagher, 104 U. S. 279 (282, 283)	3, 5, 8
Black v. Elkhorn Mining Co., 163 U. S. 445 (450)	8
Cameron v. United States, 252 U. S. 450	10
Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220 (223)	9–10
Hodgson v. Midwest Oil Co., 17 Fed. 2d. 71	8
In re *H. H. Yard*, 38 L. D. 59	10
In re *J. B. Nichols and Cy Smith* (On rehearing) 46 L. D. 20	10
Lane v. Hoglund, 244 U. S. 174 (177)	11
Union Oil Co. v. Smith, 249 U. S. 337 (350)	8
United States v. West, 30 Fed. 2d. 742 (745)	1, 8
Work v. Braffet, 276 U. S. 560 (566)	3
Statutes:	
Act of February 25, 1920, "The Leasing Act," Section 37	3, 6, 9, 10, 11
Revised Statutes, Sections 2324, 2325	3, 4, 6, 9

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 813

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is now reported in Advance Sheet No. 5 dated April 4, 1929, of 30 Fed. 2d., beginning at page 742, under the title of U. S. ex rel. *Krushnic v. West,* Secretary of the Interior.

STATEMENT

Since the above opinion was rendered, Secretary West has been succeeded by Ray Lyman Wilbur, as Secretary of the Interior, and the latter has been substituted for Secretary West as the Petitioner herein.

The nature of the controversy is clearly outlined in the Secretary's petition, as far as it goes. But there

are certain important facts, essential to a proper understanding of the controversy, which are not clearly brought out in the petition and which will now be briefly mentioned.

The Secretary, in his final opinion, admitted that Spad No. 3, the mining claim here involved, was a valid claim existent on February 25, 1920, the date upon which the Leasing Act became effective (R. 23).

During the assessment year 1920 (ending June 30, 1921) the owners of Spad No. 3 actually expended the statutory requirement of $100.00 in labor for the benefit, as they supposed, of that claim. The work was not done within the boundaries of that claim but upon adjacent claims owned by the same persons. The Secretary held that such labor did not tend to the development of Spad No. 3, and rejected it. But afterwards, in the assessment year 1921, Respondent actually expended more than $100.00 in annual labor on the claim in question.

In the assessment year 1922 Respondent again expended more than $100.00 on Spad No. 3. He continued his expenditures on Spad No. 3 until the total was more than $500.00 and then applied for patent. Some years later, the Interior Department contested the claim on the ground, among others, that the 1920 assessment work did not benefit this particular claim.

The forfeiture, attempted to be pronounced by the Interior Department against the owners of the claim followed some years after the doing of the annual labor for 1921, the doing of the annual labor for 1922 and the application for patent.

ARGUMENT

SINCE THE PASSAGE OF THE LEASING ACT OF 1920, AS BEFORE, THE OWNER OF A VALID MINING CLAIM, WHO HAS DEFAULTED IN ANNUAL LABOR, HAS A RIGHT TO RESUME ANNUAL LABOR AT ANY TIME PRIOR TO THE INITIATION OF A RIGHT TO THE CLAIM BY ANOTHER DURING THE PERIOD OF DEFAULT; AND SUCH CLAIM MAY BE PERFECTED UNDER SECTION 37 OF THE LEASING ACT.

In reaching its judgment of January 7, 1929 (R. 52), the Court of Appeals of the District of Columbia followed clear and positive decisions of this Court. Sections 2324 and 2325 Revised Statutes have repeatedly been construed by this Court and the exception contained in Section 37 of the Leasing Act was construed by this Court in the case of *Work v. Braffet,* 276 U. S. 560 (1928). The judgment of the Court of Appeals in its entirety is clearly in strict conformity with such decisions.

In his final opinion the Secretary of the Interior admitted that the mining claim involved here was "a valid claim existent on February 25, 1920," when the Leasing Act went into effect (R. 23). As such, it was, in the language of Chief Justice Waite, in *Belk v. Meagher,* 104 U. S. 279 (283), "property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent." This Court has invariably so declared the law.

Such being the character of the mining claim here involved, it was expressly preserved with all its incidents by the exception in Section 37 of the Leasing Act. In *Work v. Braffet,* 276 U. S. 560 (1928) (566), this Court held that substantial rights are preserved by the

exception, and that the preservation of such rights was the purpose of the exception. The Court says:

> "The construction argued for would tend to defeat the purpose of the Leasing Act which was to prevent the sale of the mineral lands of the United States *where substantial rights had not been acquired in them,* and to permit their exploitation only by lessees paying royalties to the Government. The reference in Sec. 37 to valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery' at least suggests that they embrace only *such substantial claims as would on compliance with the provisions of the former law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development which, if continued to discovery and entry would entitle the claimant to a patent.* That such was the purpose is established by the Congressional debates. 58 Cong. Rec. pt. 5, pp. 4577-4585. 66th Cong. 1st Sess." (Italics ours.)

The claim of Respondent is a "substantial claim" as defined by this Court in the above quotation, and consequently is embraced within the exception in Section 37. It was acquired under the mining laws by location, legal possession thereof by the locators and their grantees, has been uninterruptedly maintained, and sufficient patent work thereon has been done to entitle Respondent to a patent under the provisions of Section 2325 (R. 2—Brief of Petitioner, p. 2).

Under Section 2324 Revised Statutes, as construed by this Court, the extreme penalty resulting from

failure to perform annual labor upon a mining claim within the assessment year is to subject such claim to relocation during the period in which such annual labor is in default. This section gives the owner of the mining claim the express right to resume work on his claim at any time before entry by another, and such resumption of work operates to continue the exclusive possessory rights of the original locator. In *Belk v. Meagher, supra,* this Court states the law as follows (282):

> "It seems clear to us that, if work is renewed on a claim * * * before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the Act. The argument * * * of the plaintiff in error is, that if no work is done * * * all rights under the original claim are gone, but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued * * * if, before another entered on his possession and relocated the claim, he resumed work * * *. His rights after resumption were precisely what they would have been if no default had occurred."

The rule as laid down by this Court in *Belk v. Meagher* has been followed by Federal courts and by courts of last resort in all the mining states.

In spite of this clear cut rule, the Department held in the instant case that the resumption of work by Respondent was unavailing. The reason assigned by the Department for this ruling was that the proviso to

Section 37 of the Leasing Act automatically repealed or limited the application of Section 2324 in the case of mining locations falling within the terms of that proviso. The validity of this ruling was successfully challenged by Respondent in the pending action.

Petitioner's argument is confined to his postulate that "Section 37 of the Leasing Act of 1920 operated as a withdrawal of the land when locator defaulted in making annual expenditures and cut off his right to repossess and resume assessment work under Section 2324, Revised Statutes."

This assertion is supported neither by the purpose nor the language of Section 37, by Court decisions, by the former procedure of the Interior Department, nor by any recognized rule of statutory construction. Moreover, it infers a "repossession" by the locator, which implies a precedent dispossession that is wholly imaginary.

All the authorities are against Petitioner's contention. The fundamental fallacy underlying it, is the assumption that the Leasing Act applies to the facts composing the record of this case. It does not. The exception embodied in Section 37 excludes "valid claims existent at the date of the passage" of the Act, from the operation of the Act. This is equivalent to a recital that "This act shall not apply to or affect such valid claims."

Had the latter phrase been employed, the excluded claims would have proceeded to patent and been maintained under the old mining laws precisely as provided for under the recitals of the exception as it is. And it

is the old mining law only which applies to Respondent and with which he is concerned. Under its terms failure to perform the assessment work within the statutory year does not forfeit the claim nor dispossess the owner nor affect his title unless and until adverse rights are acquired by relocation. He may resume and complete the work at any time before that contingency becomes a fact.

With that contingency the Department of the Interior has no concern. Section 55 of its regulations, announced over a half century ago, declares that the subject of annual expenditure is "solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession the determination of which is committed exclusively to the courts."

Petitioner reaches his decision denying patent to Spad No. 3 by a unique mental process, which might be summed up as follows: because the claim excluded from the Leasing Act cannot be relocated, the old mining laws cannot function as to it; therefore, he contends, it is forfeited and the privilege of resuming work after delinquency is taken from it; and it reverts, by operation of law, back to the public domain and into the dominion of the Leasing Act.

This reasoning is founded upon an untenable premise, to-wit: that the land cannot be relocated; but if the premise were true, still the conclusion reached would not be sound because there is nothing in the Leasing Act to justify it. Take the instant case, for example. The work for 1920, though afterwards held

ineffective, was actually performed, was followed by performance of assessment work for the two succeeding years, was followed by $500 of work and finally by the patent proceedings. Only at the end of this series of events does the Department say that Spad No. 3 was forfeited a number of years before because the work was held to have been done in the wrong place. This Departmental denial of justice is a virtual repudiation of the statute, whose object was fully detailed in Congressional discussions (58 Cong. Record, Part 5, pp. 4577-4582). It ignores its own Regulation 55, and conflicts with an unbroken line of decisions by this Court, beginning with *Belk v. Meagher, supra.*, decided Dec. 4, 1881.

We are unable to perceive the application of *Union Oil Company v. Smith,* 249 U. S. 337, or of *Black v. Elkhorn Mining Company,* 163 U. S. 445 to the instant case. The first very properly declares that assessment work has nothing to do with locating or holding a claim before discovery. The second holds that dower rights do not attach to possessory rights in an unpatented mining location.

As stated by the Court of Appeals in its decision (R. 47-48) 30 Fed. (2d.) 742 (745) the case of *Hodgson v. Midwest Oil Co.,* 17 Fed. (2d.) 71, cited on page 10 of the brief of Petitioner "turned largely upon a question of pleading."

There is no question in the instant case of abandonment which was the controlling fact in the land decisions cited in Petitioner's brief.

Section 37 of the Leasing Act adds nothing to the penalty for failure to do assessment work as provided in Section 2324. The valuable right of resumption of work with the resulting preservation of his property are saved to the original locator. The only limitation on the right to resume work after the passage of the Leasing Act, as before, continues to be the initiation of a right to the claim by another during the period while the default in assessment work continues. Petitioner would add an additional limitation as set out by Petitioner on page 10 of his brief "that during the time of default the land had not been withdrawn by the United States" but such additional limitation is not to be found in Section 37 of the Leasing Act.

On page 12 of the brief of Petitioner it is stated that the practical effect of the decision of the Court of Appeals is to allow the locator to postpone indefinitely the completion of work necessary to the issuance of patent. Application for patent could be indefinitely postponed under the old mining laws—in fact many valuable mineral claims from which many hundreds of thousands of dollars worth of ore have been extracted have never been patented. The Leasing Act has not removed the necessity on the part of the owners of mining claims, covering the mineral substances embraced in the Act, of the performance of annual labor to protect their claims against attack. But such attack requires an overt act, either by a third person or by the Government, itself. The Government may "by direct proceedings, upon notice, set it aside and restore the land to the public domain." *Clipper Mining Co. v. Eli*

Mining & Land Co., 194 U. S. 220 (223); *Cameron v. United States*, 252 U. S. 450; In re *H. H. Yard*, 38 L. D. 59; In re *J. B. Nichols and Cy Smith* (on rehearing), 46 L. D. 20. Any third person who wishes to obtain a lease in accordance with the provisions of the Leasing Act to the particular ground embraced within the limits of a mining claim on which the assessment work is in default, may make application for a lease at any time while the default continues and before resumption of work upon the claim by the owner. Such application at once constitutes the initiation of an adverse claim which the Department of the Interior can pass upon. A third person may initiate rights to the ground under laws other than the mining laws, for the Leasing Act does not prohibit surface agricultural entries but provides the method for the disposition of mineral deposits only. It is thus apparent that since the passage of the Leasing Act, as before, a locator runs the risk of losing his claim while his assessment work is in default. But if he resumes work and cures his default before the initiation of any adverse claim during the continuance of the default, then he has preserved his claim in its original vigor, and he is entitled to continue to maintain his claim and to perfect the same under the prior laws. And this is the situation presented in the instant case.

Petitioner repeatedly urges that the Leasing Act is intended to provide revenue to the United States from the public lands containing mineral (Brief of Petitioner, pp. 11, 13). Whatever the intention may be as to lands which were part of the public domain at the

date of the passage of the Act, no intent is manifested therein to subject existing property rights, "to confiscation by operation of departmental law" to use the language of the Court of Appeals (R. 50), for the Act expressly provides that valid claims existent at the date of its passage may be "perfected" in compliance with the laws under which initiated.

Spad No. 3 having been located under the general mining laws before February 25, 1920, it was as completely excepted from the Leasing Act as was the homestead in the forest reserve taken out of the reserve by the President's proclamation in *Lane v. Hoglund,* 244 U. S. 174, 177, where this Court, through Mr. Justice Van Devanter, said:

> "For present purposes no importance attaches to the creation of the forest reserve after the primary and before the final entry. The entryman was free, under the terms of the President's proclamation, to proceed with the steps essential to obtain a final entry and ultimately the full title, and to such a final entry the statute—the provision in Sec. 7—has the same application as if the land were without instead of within the reserve."

It is admitted that, but for the intervention of the Leasing Act, Respondent would be entitled to a patent. The statutes under which Respondent claims are not attacked as unconstitutional. Such statutes—the old mining statutes and the exception in Section 37 of the Leasing Act as well—have been construed by this Court, and under such statutes as already construed by this Court Respondent is clearly entitled to the re-

lief granted him by the Court of Appeals of the District of Columbia and the decision of that Court, review of which is now sought, is clearly correct. Under these conditions, we respectfully submit that the petition for the writ of certiorari should be denied.

CHARLES S. THOMAS,
CHESTER I. LONG,
MALCOLM LINDSEY,
LANGDON H. LARWILL,
GEORGE K. THOMAS,
PETER Q. NYCE,
Attorneys for Respondent.

Office Supreme Court, U
FILED
DEC 2 1929
CHARLES ELMORE CROP
CLERK

FILE COPY

No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1929

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

EAMES BROS., PRINTERS, DENVER

INDEX

Page

Opinions below 1
Statement 1
Summary of argument 3
Argument:
I. Mandamus is the proper remedy 3
II. The decision of the Secretary was erroneous: 12
(a) A valid mining claim is property 12
(b) The right of resumption of work 16
(c) Abandonment and forfeiture distinguished 40
(d) Function of assessment work since Leasing Act 43
Conclusion 52

CITATIONS

Cases:
Ballinger v. U. S. ex rel. Frost, 216 U. S. 240 (250) 7
Belk v. Meagher, 104 U. S. 279 (282, 283, 284, 285) 13, 23, 24, 25, 33, 38, 39, 45
Bingham Amalgamated Copper Co. v. Ute Copper Co., 181 Fed. 748 (750) 26
Black v. Elkhorn Mining Company, 163 U. S. 445 ..... 29, 30
Bradford v. Morrison, 212 U. S. 389 (395) 14
Cole v. Ralph, 252 U. S. 286 30
Cronberg v. Hazlett, 51 L. D. 101 ..... 31, 32
Deeney v. Milling Co., 11 N. M. 279 46
Elder v. Horseshoe Company, 194 U. S. 248 (256) 13
Elder v. Wood, 208 U. S. 226 14
Emerson v. McWhirter, 133 Cal. 510 (515) 27
Farrell v. Lockhart, 210 U. S. 142 ..... 29, 30
Field v. Tanner, 32 Colo. 278 (285) 27
Florence-Rae Copper Co. v. Kimbel, 85 Wash. 162 (173) 28
Forbes v. Gracey, 94 U. S. 762 (767) 12, 16
Gwillim v. Donnellan, 115 U. S. 45 30
Hodgson v. Midwest Oil Company, 17 Fed. (2nd) 71 29
Honaker v. Martin, 11 Mont. 91 ..... 30, 31
Interstate Oil Corporation and Frank O. Chittenden, 50 L. D. 262. 30, 31
Justice Mining Company v. Barclay, 82 Fed. 554 (559) 41
Kinney, E. C., 44 L. D. 580 ..... 30, 31
Knutson v. Fredlund, 56 Wash. 634 (639) 28, 37
Lacey v. Woodward, 5 N. M. 583 27
Lane v. Hoglund, 244 U. S. 174 (181) 8
Little Gunnell Co. v. Kimber, 15 Fed. Cases No. 8402 ..... 30, 31
Madison v. Octave Oil Co., 154 Cal. 768 (773) 27
Manuel v. Wulff, 152 U. S. 505 (510) 13
McEvoy v. Megginson, 29 L. D. 164 (165) 18

Cases—Continued. Page

Nichols v. Priest, 29 L. D. 401 (402) 18
Nielson v. Champagne Company, 29 L. D. 491 (493) 19
North Noonday Mining Company v. Orient Mining Company, 1 Fed. 522 (536) 26
Payne v. Central Pacific Railway Company, 255 U. S. 228, (236, 237, 238) 9, 10
Roberts v. United States, 176 U. S. 221 (231) 6
Spokane, etc., Ry. v. Wash. and Gt. Nor. Ry., 219 U. S. 166 (174) 47
St. Louis, etc., Railroad Co. v. McGee, 115 U. S. 469 (474) 47, 48
Swanson v. Kettler, 17 Ida. 321 30
Swanson v. Sears, 224 U. S. 180 30
Thatcher v. Brown, 190 Fed. 708 (710) 35, 36, 37
Union Oil Company v. Smith, 249 U. S. 337 ..... 29, 30
West v. Standard Oil Company, 278 U. S. 200 (218, 220) 10, 11
Wolenberg, In re, 29 L. D. 302 (304) 18
Work v. Braffet, 276 U. S. 560 (566) 15
Work v. U. S., ex rel. McAlester-Edwards Company, 262 U. S. 200 9
Yosemite National Park, 25 L. D. 48 (49, 50) 14, 15

Statutes:

Act of July 2, 1898, ch. 563, sec. 1, 30 Stat. 651 31
Act of March 2, 1907, ch. 2559, 34 Stat. 1243 35
Mineral Leasing Act of February 25, 1920, ch. 85, sec. 37, 41 Stat. 437, 451 (U. S. C., Title 30, sec. 193) 16, 20, 34, 37, 49, 50
Revised Statutes—
Sec. 2319 (U. S. C., Title 30, sec. 22) 20
Sec. 2322 (U. S. C., Title 30, sec. 26) 21
Sec. 2324 (U. S. C., Title 30, sec. 28) 21
Sec. 2325 (U. S. C., Title 30, sec. 29) 21, 22

Miscellaneous:

General Mining Regulations of March 29, 1909, par. 55, (37 L. D. 769) 19
Lindley on Mines, Vol. 2 (3rd Ed.) Sec. 643, pp. 1597-1598 40

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 31.)

The opinion of the Court of Appeals (R. 34) is reported in 30 F. (2d) 742.

STATEMENT

This case is before this Court upon what is practically an agreed statement of facts.

The Secretary of the Interior in his final opinion admitted that Spad No. 3, the mining claim here involved, was "a valid claim existent on February 25, 1920" when the Leasing Act went into effect. (R. 19.)

During the assessment year 1920 (ending June 30, 1921) the owners of Spad No. 3 actually expended the statutory requirement of $100 for the benefit of said claim, as they believed. The work was not done within the boundaries of the claim itself but upon adjacent claims in the same group owned by the same persons. In the assessment year 1921 Respondent, who had then acquired the interests of his co-locators, actually expended more than $100 in labor on said claim itself. In the assessment year 1922 Respondent again expended more than $100 in annual labor on the claim in question. He continued his expenditures on the claim until a total of more than $500 had been expended in labor and improvements on the claim itself, and then applied for patent and paid the government price for the land covered by the claim.

Thereafter contest proceedings were initiated and proceeded with. At the final conclusion of such proceedings the Secretary found as a fact that the annual labor performed for the benefit of Spad No. 3 claim during the assessment year 1920 did not tend to the development of the claim, and, upon such finding of fact declared, as a matter of law, that the claim became forfeited to the United States immediately upon the expiration of the assessment year 1920. The Secretary based such declaration of law upon his interpretation of Section 37 of the Leasing Act and of its effect upon the old mining laws.

This action was prosecuted in the courts below to test the correctness of the Secretary's rulings on the matters of law above set out.

SUMMARY OF ARGUMENT

Rulings by the Secretary of the Interior on matters of law are reviewable in the courts which will prevent by mandamus or injunction any denial of rights to any citizen by the Secretary because of his erroneous construction of any law, under which no discretion is vested in the Secretary.

The construction placed by the Secretary on Section 37 of the Leasing Act of February 25, 1920, is erroneous. That section does not repeal any part of Section 2324 or Section 2325 of the Revised Statutes insofar as a valid existing claim is concerned. Under Section 37 of the Leasing Act valid claims existent at the date of the passage of the act may be maintained and perfected under the prior laws. Failure to perform annual labor within the assessment year is attended with no more serious penalties since the passage of the Leasing Act than before. Such failure merely subjects the claim on which the failure has occurred to the possibility of forfeiture during the continuance of the default. The owner still has the right to resume work upon his claim at any time prior to the initiation of a right to the claim by another. When the owner has complied with the provisions of Section 2325 of the Revised Statutes he is entitled to a patent and the Secretary has no discretion to refuse it.

ARGUMENT

I

MANDAMUS IS THE PROPER REMEDY

Respondent has exhausted his possibilities of securing relief in the Department of the Interior. The Secretary has assumed to declare a forfeiture of Re-

spondent's rights and has finally refused him a patent. The Secretary has based his actions upon his construction of Section 37 of the Leasing Act and the effect which he conceives such act to have upon Sections 2324 and 2325 of the Revised Statutes. All of these statutes are positive laws. None of them vest any discretion in the Secretary as to their meaning.

Under Section 2325 the Secretary must, of course, determine whether the applicant for patent has in fact complied therewith by filing the proper application, posting and publishing notice, performing $500 worth of labor, etc. When the Secretary has found as a fact that these conditions have been performed, he must issue patent, and if he refuses, the courts by mandamus will compel him to do so. In the instant case, Respondent has complied with every requirement of Section 2325 pertaining to the issuance of patent. Nevertheless, the Secretary has refused to issue patent because, he declares that Section 37 of the Leasing Act impliedly repeals Section 2324 so far as the provision in that section for resumption of work is concerned, and impliedly amends said Section 2324 by adding thereto an *ipso facto* forfeiture upon default in annual assessment work, contrary to the express language of said Section and the settled construction thereof for over half a century.

In the succeeding pages of this brief we shall present arguments to show that the Secretary has erroneously conceived the meaning and effect of the Leasing Act. In such a situation the courts have not only the power but the imperative duty to correct the Secretary

and compel him to grant Respondent his rights under the law.

It could make no difference how free from arbitrariness or capriciousness the determination of a Secretary might be, or how many decisions or regulations of the Department of the Interior or decisions of courts he might have considered in reaching a determination, if such determination were wrong, and resulted in depriving a citizen of a vested property right.

The general principles governing the relationship of the courts to the executive departments of the Government of the United States may be stated as follows:

1. If a department is constituted a tribunal to try a question of fact its finding thereon will not be reviewed by the courts.

2. If a department is given discretion as to the meaning of a law its conclusion as to the meaning of such law will not be overridden by the courts even though the courts might have come to a different conclusion as to the meaning of the law.

3. If a law does not give a department discretion to construe it, then the courts by mandamus or injunction will prevent a wrong construction of such law by a department.

To put the matter in other words: if a law provides for a department to do a certain thing upon the happening of certain events, then when such events have happened the thing to be done by the department becomes ministerial and in such case the department is not invested with discretion and the courts will com-

pel the performance of the thing by mandamus or prohibit a wrong performance by injunction.

Roberts v. U. S., 176 U. S. 221, was a case where a writ of mandamus was sought to compel the Treasurer of the United States to pay the relator certain interest. This Court, speaking through Mr. Justice Peckham, said on page 231:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the

powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plainly they violated their duty in refusing to perform the act required."

"In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

A part of the language in the Roberts decision above quoted was quoted with approval by Mr. Justice Brewer in *Ballinger v. U. S. ex rel. Frost,* 216 U. S. 240. The Frost case was an application for a mandamus against the Secretary of the Interior compelling him to deliver a patent to a tract of Indian land. On page 250 of the opinion the following language is used, quoting from earlier decisions of this Court:

"The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

"Where the right to a patent has once become vested in the purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty."

"No further authority to consider the patentee's case remains in the land office. No right

to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus."

The language of the Roberts case was again quoted with approval by Mr. Justice Van Devanter in *Lane v. Hoglund,* 244 U. S. 174. The Hoglund case was an application for a writ of mandamus against the Secretary of the Interior directing the issuance of a homestead patent. The mandamus was allowed, although the Secretary earnestly contended that he had discretion to construe the statute there in question and the trial court so held. But this Court held otherwise, saying on page 181 of its opinion:

"Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter

of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent."

"True this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. * * * This, we think, is such a case."

The language of the Roberts case was again quoted with approval, this time by Chief Justice Taft, in *Work v. U. S., ex rel. McAlester-Edwards Company,* 262 U. S. 200. This was also a mandamus against the Secretary of the Interior to require him to accept purchase price and issue a land patent. The issuance of the patent was ordered by this Court.

In *Payne v. Central Pacific Railway Company,* 255 U. S. 228, injunction was brought against the Secretary of the Interior to prevent him from cancelling a railroad land selection. The decision was written by Mr. Justice Van Devanter, and, quoting from an earlier decision, this Court said on page 237:

"A person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof."

Speaking with reference to the general rule announced in the statutes that the administrative execu-

tion of all public land laws is to be under the supervision and direction of the Secretary of the Interior, this Court further said on page 236:

> "But of course it does not clothe him with any discretion to enlarge or *curtail the rights* of the grantee nor to *substitute his judgment for the will of Congress as manifested in the granting act.*" (Italics ours.)

On page 238 in granting the injunction this Court said:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title."

An exhaustive review of the authorities is contained in *West v. Standard Oil Company,* 278 U. S. 200, decided by this Court in January of the present year. In that case an injunction against the continuation of proceedings in a local land office inquiring into the mineral character of certain lands, was sought. The injunction was denied. The decision was written by Mr. Justice Brandeis. On page 218 this Court says:

> "Where, by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent, * * * Congress, by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specific-

ally imposed. After issue of the patent or other like instrument, his findings of fact are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts * * *; and, though his rulings on matters of law are reviewable in the courts, * * * they are not subject to re-examination by the Department."

In the Standard Oil case this Court on page 220 quotes with approval the language of the Payne case in the second quotation therefrom set out above to the effect that the broad power of control and supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

It is thus apparent that the Secretary has no discretion "to curtail the rights" of the Respondent nor has the Secretary any discretion "to substitute his judgment for the will of Congress as manifested in the granting act." Furthermore, whenever through a "mistaken conception of their authority" departmental officials fail to issue a patent or attempt to cancel a valid entry, the courts will award the writ of mandamus or the writ of injunction, as the case may be, depending upon whether the writ is to compel the performance of a legal act or to forbid the performance of an illegal act.

In the present case the writ of mandamus is sought to compel the issuance of a patent as in the Frost, Hoglund and McAlester cases above cited, in all three of which this Court by mandamus compelled the Secretary of the Interior to deliver land patents.

II

THE DECISION OF THE SECRETARY WAS ERRONEOUS

We shall apportion our discussion of this second proposition under the following topical headings:

(a) A valid mining claim is property;
(b) The right of resumption of work;
(c) Abandonment and forfeiture distinguished;
(d) Function of assessment work since Leasing Act.

(a) A VALID MINING CLAIM IS PROPERTY.

In his decision of February 8, 1928, the Secretary of the Interior admitted that the mining claim here involved was "a valid claim existent on February 25, 1920," the date when the Leasing Act went into effect. (R. 19). Our first consideration, therefore, must be as to the nature of a valid mining claim under the law of 1872.

In *Forbes v. Gracey,* 94 U. S. 762, this Court, speaking through Mr. Justice Miller, held that a mining claim is property, although no application for patent has been made, and that such claim can be made the subject of a lien for taxes.

On page 767 this Court said:

> "Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. This claim

may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it."

The language above quoted was adopted by this Court in the celebrated case of *Belk v. Meagher,* 104 U. S. 279. The decision was written by Chief Justice Waite and on page 283 this Court said:

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

In *Manuel v. Wulff,* 152 U. S. 505, Chief Justice Fuller said on page 510:

"It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

This was said as to an unpatented mining claim.

In *Elder v. Horseshoe Company,* 194 U. S. 248, in an opinion by Mr. Justice Peckham in speaking of an unpatented mining claim on page 256 it was said:

"The actual title to the fee is in the govern-

ment, but the interest of the miner may be conveyed and inherited."

In *Elder v. Wood,* 208 U. S. 226, this Court, speaking through Mr. Justice Moody, held that the interest of the locator in an unpatented mining claim was taxable in spite of the prohibition against taxing the property of the United States.

In *Bradford v. Morrison,* 212 U. S. 389, in an opinion by Mr. Justice Peckham, this Court held that the interest of the owner of an unpatented mining claim could be reached by a judgment lien. The Court reviews the decisions hereinbefore cited in this section of this brief and then says on page 395:

> "We thus find that the title of a locator to a mining claim is not only property, but it is property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited, without in any manner infringing the title of the United States."

In *Yosemite National Park,* 25 L. D. 48, Mr. Justice Van Devanter, then assistant attorney general, considered the question of the situation of a mining claim included within the reservation and withdrawal from settlement of certain lands known as Yosemite National Park. By the act creating the Park it was declared (p. 49), that "all persons who shall locate or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and remove therefrom: Provided, however, that nothing in this act shall be construed as in any

wise affecting * * * any *bona fide* entry of land made within the limits above described under any law of the United States prior to the approval of this act." In the opinion it was said (p. 50):

> "As has been seen, 'any *bona fide* entry of lands' within said park, made prior to the act of October 1, 1890, was specifically excepted from the operation thereof. No mention is made therein of any existing mining claim for which entry had not been made. No specific exception was really necessary to reserve any land duly entered from the operation of the act since such land, being then already appropriated, was not subject to other disposition by Congress; and it is equally clear from the language of the supreme court in the cases cited above, that no exception was needed to reserve any mining claim duly located and held in compliance with the mining laws at the date of said act. The right to the possession and use of such a claim and ultimately to perfect title to the same in accordance with the mining laws was a property right and was just as much protected by the constitutional guaranty that private property shall not be taken for public use without just compensation as was 'any *bona fide* entry' mentioned in said proviso."

It is thus apparent that the claim here involved is not "nebulous and insubstantial" as was the claim before this Court in *Work v. Braffet,* 276 U. S. 560, 566, but in the language of Mr. Justice Stone found on page 566 of that decision is a substantial claim such "as would on compliance with the provisions of the former law ripen into ownership."

It is clearly apparent, therefore, that at the time the Leasing Act was passed the claim involved in this case was property "in the highest sense of the term." It was a type of property well known in the mining regions of the United States and often of great value, as in the Forbes case, above cited, where the Court pointed out that the property there involved was "said to be worth from fifty to a hundred millions of dollars." Such was the character of Spad No. 3 mining claim at the time of the passage of the Leasing Act.

(b) THE RIGHT OF RESUMPTION OF WORK.

The Leasing Act of February 25, 1920, provides a new method of disposition of the deposits of certain minerals, including oil shale in lands which were public lands at the date of its passage. Section 37 of the Act, moreover, expressly excepts from the operation of the Act valid claims existent at the date of the passage of the Act and thereafter maintained in compliance with the laws under which initiated "which claims may be perfected under such laws." As to such claims, therefore, the old laws remain in full force and effect. Manifestly such claims must be considered in the light of the decisions construing such former laws and declaring the policy of the same. Such policy was to promote the development of the mining resources of the United States, not for the purpose of direct revenue to the United States, but for the purpose of the indirect benefit resulting from the settlement of the country and the bringing of its undeveloped mineral resources into commercial use.

Throughout Petitioner's brief frequent reference is made to the policy and purpose of the Leasing Act, which, it is declared, is to conserve the mineral resources of the United States and to permit their development only under leases providing direct return to the United States by way of royalties. This policy of the Leasing Act is not only a departure from, but is the absolute antithesis of the policy of the old mineral laws. The two policies cannot be reconciled. In considering, therefore, the status of the mining claim in question in this case it must be determined at the outset which of these two antagonistic policies is to govern.

The question is, can the policy of the Leasing Act affect the status of the mining claim in question in this case? Our answer is that it cannot, for two equally good reasons:

First, Spad No. 3 placer claim was property in the highest sense of the term at the date of the passage of the Leasing Act and a change in governmental policy cannot destroy property;

Second, the Leasing Act by its terms does not even purport to attempt to destroy such property, for it expressly excepts just such existing mining claims.

As to such excepted claims, the laws under which they were initiated constitute the basis and the measure of their rights, privileges and burdens. Likewise, the construction given to such laws prior to the passage of the Leasing Act is controlling.

It has been repeatedly held that the Government

has no concern with the performance of the annual labor under Section 2324.

In *McEvoy v. Megginson,* 29 L. D. 164, the Acting Secretary said on page 165:

> "The doing of annual assessment work is not a condition to obtaining patent."

In *Nichols v. Priest,* 29 L. D. 401, the Secretary said on page 402:

> "The land department has nothing to do with questions as to the performance of annual expenditure upon mining claims."

In re *Wolenberg,* 29 L. D. 302, the Secretary said on page 304:

> "The annual expenditure of one hundred dollars, in labor or improvements, required by Section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department. In this respect the requirement made by Section 2324 is essentially different from that made by Section 2325, which makes the expenditure of five hundred dollars in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department. Where the required expenditure of five hundred dollars has been made upon a mining claim, failure to perform annual assessment work will not, in itself prevent the issuance of

patent or furnish any ground of protest against the allowance of a mineral entry."

In *Nielson v. Champagne Company,* 29 L. D. 491, the Secretary said on page 493:

> "The annual expenditure upon a mining claim of one hundred dollars in labor or improvements, sometimes called assessment work, required by Section 2324 of the revised Statutes, while necessary to the continued maintenance of the possessory title *as against subsequent locators,* is not a condition to obtaining a patent. In this respect it is essentially different from the expenditure of five hundred dollars required by Section 2325, which does not affect the possessory title but is a condition to obtaining a patent, and is therefore a matter between the applicant for patent and the government (*P. Wolenberg et al.,* 29 L. D., 302). A failure to perform the annual assessment work upon a mining claim does not *ipso facto* work a forfeiture of the claim but only subjects it to relocation thereafter and before the claimant resumes work." (Italics ours.)

Section 55 of the regulations of the Department of the Interior established over fifty years ago declares that the subject of annual expenditure is "solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession the determination of which is committed exclusively to the courts." The headnote affixed to the reprint of the mining regulations quoted on page 19 of Petitioner's brief declaring certain regulations no longer applicable to deposits of the mineral substances described

in the Leasing Act, expressly excepts valid claims "existent at the date of such repeal and thereafter duly maintained pursuant to the law under which located." This leaves such regulations in full force and effect as to the claim here involved.

From the above quoted decisions and regulations of the Land Office itself, it is manifest that under the mining laws as construed prior to the existence of the Leasing Act, the Land Department had nothing to do with questions as to the performance of annual labor upon mining claims. Moreover, the performance or non-performance of annual labor under Section 2324 Revised Statutes did not in any way affect the right of a locator to a patent under the provision of Section 2325 Revised Statutes.

Both Section 2324 and Section 2325 are part of the act of May 10, 1872, which (with amendments not pertinent to the present discussion) has existed from its date down to the present time. The provisions of the act of May 10, 1872, are, in the language of the exception in Section 37 of the Leasing Act, the "laws under which" the claim here involved was initiated and the laws under which said claim "may be perfected."

Section 1 of the act of 1872, now Section 2319 Revised Statutes (U. S. C. Title 30, Section 22), declares that all valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase and the lands in which they are found to occupation and purchase by citizens of the United States.

Section 3 of the act, now Section 2322 Revised Statutes (U. S. C. Title 30, Section 26), provides that the locator shall have the exclusive right of possession and enjoyment of all the surface included within the lines of his location so long as he complies with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States.

Section 5 of the act, now Section 2324 Revised Statutes (U. S. C. Title 30, Section 28), provides that the miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording and amount of work necessary to hold possession of a mining claim subject to certain minimum requirements as to each of these matters. As to annual labor the section provides:

> "On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 6 of the act, now Section 2325 Revised

Statutes (U. S. C. Title 30, Section 29), provides the procedure for obtaining a patent.

Section 2324 is a penal statute. It provides what must be done and the penalty for the failure to do what is provided. Such being the character of the statute it must be construed strictly and in a manner as favorable to the person whose property may be subjected to the risk of being lost thereunder as is consistent with fair principles of interpretation. It is of the particular class of penal statutes wherein the penalty is provided for an act not in itself *malum in se*. The possible loss of rights of the original locator provided in the statute is not absolute or automatic, but becomes effective only if new rights are initiated to the claim prior to the resumption of work thereon by the first locator.

It has been in the light of this well established rule of construction that Section 2324 has been construed by the courts. The penalty provided in this section for the failure on the part of the owner of a mining claim to perform his assessment work within the assessment year, has been confined strictly within the language of the statute. The rule has been firmly established that the owner of a mining claim does not lose his estate in such mining claim nor does such estate terminate upon such failure, but the only penalty resulting from such failure is the possibility that adverse rights may be initiated, provided always that such initiation take place prior to the resumption of work upon his claim by the original owner.

The question of the effect of failure to perform assessment work was presented to this Court and de-

cided in the case of *Belk v. Meagher,* 104 U. S. 279 (1881). The action was ejectment brought by Belk to recover possession of a mining claim. The facts were that the claim had been originally located in 1864, prior to the enactment of the Act of May 10, 1872, which contained the first provision in any Federal statute for annual assessment work. The claim was "valid and subsisting" on May 10, 1872. By two subsequent acts the time for making the first annual expenditure under the act was extended, as to claims located prior to the passage of the act, to *January* 1, 1875. No work was done on the claim between May 10, 1872, and *June,* 1875, and the question was thus squarely presented as to the effect of the expiration of an assessment year with no annual labor performed. The assessment work continued to be in default for an interval of five months after the expiration of the assessment year. Then, during the month of *June,* 1875, and before any relocation had been made, the original locators resumed work upon the claim. No work was afterwards done on the property by the original locators or any one claiming under them.

In December, 1876, Belk attempted to relocate the property and we shall speak of his attempted relocation as the second location.

On February 21, 1877, Meagher entered the property and made another relocation which we shall speak of as the third location.

The suit was between Belk claiming under the second location and Meagher claiming under the third location. On behalf of Meagher it was contended that

the original claim, although subject to forfeiture between January 1, 1875, and the time the work was done in June, 1875, had been re-established in its original vigor by the work done in June, 1875. Should this be correct, it is clear that the assessment work done in June, 1875, protected the claim from relocation for the rest of the year 1875 and until the end of the year 1876. It was, therefore, argued on behalf of Meagher that the attempted relocation by Belk in December, 1876, was invalid because the land was then covered by the original location made by the first locator.

On behalf of Belk the identical contention was made which Petitioner makes here: that all rights under the first location were *ipso facto* forfeited on January 1, 1875, at the expiration of the first assessment year, the assessment work being then undone. This Court, however, held that the failure of the first locators to perform assessment work in the year ending January 1, 1875, did not *ipso facto* terminate their estate; that the performance of assessment work by them in June, 1875, cured their prior default; and that, accordingly, their original location continued in full force throughout the remainder of the year 1875 and the entire year 1876.

Accordingly this Court held that when Belk attempted to make his second location in December, 1876, the premises were not open for that purpose and that his attempted location was, therefore, invalid.

The Court further held that at the time Meagher made the third location the premises were open for such location since the assessment year 1876 had ex-

pired and there had been no resumption of work upon the claim by the original locators between January 1, 1877, and the time of the Meagher location.

The issue was thus squarely presented and this Court, speaking through Chief Justice Waite, declared the law as follows (page 282, 104 U. S.):

> "For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, *the exclusive possessory rights of the original locator* and his assigns *were continued without any work at all, until Jan.* 1, 1875, *and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law.* His rights after resumption were precisely what they would have been if no default had occurred." (Italics ours.)

In *North Noonday Mining Company v. Orient Mining Company,* 1 Fed. 522 (536) (C. C. Calif. 1880), Federal Judge Sawyer had so construed the act before the decision of this Court in *Belk v. Meagher* in the following language:

> "The statute requires $100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and, in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim."
>
> "The statute nowhere authorizes a person to trespass upon or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim."

In *Bingham Amalgamated Copper Co. v. Ute Copper Co.* 181 Fed, 748 (750) (C. C. D. Utah 1910), the rule is again stated:

> "The contention is also made that, because the plaintiff failed to affirmatively show the performance of assessment work for its claim for the year 1908, it must be denied relief. A failure to perform the required annual labor does not in and of itself work a forfeiture. It only permits a relocation. As the Abraham claim was located February 25, 1906, it cannot be considered a relocation

of the plaintiff's claims based on the failure to perform the annual labor for 1908."

The language of this Court in *Belk v. Meagher,* quoted above, was quoted and followed by the Supreme Court of New Mexico in *Lacey v. Woodward* (1891), 5 N. Mex. 583. The doctrine laid down in *Belk v. Meagher* has been followed by the Supreme Courts of all mining states.

In *Emerson v. McWhirter* (1901), 133 Cal. 510, 515, the Supreme Court of California said:

> "We think these facts show resumption of work, within the meaning of the statute, and prevented forfeiture. Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, *and no evidence appears from which an intention to abandon may be inferred,* the courts should construe the law liberally, to prevent forfeiture. Indeed, this is the rule generally as to forfeitures. The courts are reluctant to enforce a forfeiture deeming this class of penalties odious in law; * * *." (Italics ours.)

The above case was quoted and followed in *Madison v. Octave Oil Co.* (1908), 154 Cal. 768, 773, where the court said, after quoting Section 2324 of the Revised Statutes:

> "It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right."

In *Field v. Tanner* (1904), 32 Colo. 278, 285, the Supreme Court of Colorado said:

> "It will be observed that failure to do the annual assessment work does not *ipso facto* work a forfeiture of a lode mining claim, but the same merely becomes liable to forfeiture, which may be complete and final *when the rights of third persons accrue.* If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. McGinnis et al. v. Egbert, 8 Colo. 41, 5 Pac. 652. Belk v. Meagher, 104 U. S. 279. (Italics ours.)

In *Knutson v. Fredlund* (1910), 56 Wash. 634, 639, the court, quoting and following 2 Lindley on Mines (2d Ed.), Sec. 651, states:

> "Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture. *It does not restore a lost estate.*" (Italics ours.)

In *Florence-Rae Copper Co. v. Kimbel* (1915), 85 Wash. 162, 173, the Supreme Court of Washington said, after quoting R. S. Sec. 2324:

> "A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise. * * * Lindley, Mines (2d Ed.), Sec. 651. Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture, Belk v. Meagher, 104 U. S. 279."

Of course, as might be anticipated in a subject which has so often received the attention of the courts, there are some cases in which inapt expressions have

been used. The language in the case of *Hodgson v. Midwest Oil Company,* 17 Fed. (2d.) 71, quoted on page 20 of Petitioner's brief, taken by itself would seem to run counter to all of the decisions cited above in this brief, but an examination of the facts in the Hodgson case shows that such case was ejectment by a prior locator against persons who had come into possession of the property and were maintaining possession. The case being ejectment where the plaintiff must rely on the strength of his own title, the court sustained the demurrer because of the failure of the plaintiff to allege his continued assessment work up to the time of the bringing of the suit, the suit having been brought in 1925, the last assessment work having been done in 1920, and no adequate legal excuse for failure to do the assessment work being set out. The quotation in Petitioner's brief shows that the case was decided on the technical rules in regard to ejectment:

> "Now, it seems to us clear that, if an adequate legal excuse for not doing the assessment work or making the improvements is not stated in the petition, then the plaintiff has failed to state a cause of action in ejectment * * *. The plaintiff, therefore, fails to plead the requisite title in himself to show right of recovery."

On page 37 of Petitioner's brief there is a second quotation of a statement of mining law from the Hodgson case which even Petitioner concedes is incorrect.

Petitioner also cites or quotes from *Black v. Elkhorn Mining Company,* 163 U. S. 445; *Farrell v. Lockhart,* 210 U. S. 142; *Union Oil Company v. Smith,* 249

U. S. 337; *Cole v. Ralph,* 252 U. S. 286; *Gwillim v. Donnellan,* 115 U. S. 45; *Swanson v. Sears,* 224 U. S. 180; *Little Sunnell Co. v. Kimber,* 15 Fed. Cases, No. 8402; *Swanson v. Kettler,* 17 Ida. 321; *Honaker v. Martin,* 11 Mont. 91.

An examination of these cases shows that in none of them was there before the court, as in the case of *Belk v. Meagher, supra,* the question as to the rights of a locator after default in assessment work.

In the Black case the sole question decided was that a locator of an unpatented mining claim has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband.

In the Farrell case the question was abandonment of a claim prior to the expiration of the statutory period for performing annual labor, the annual labor having been done in that period.

In the Union Oil Company case the question before the Court was the effect of assessment work prior to discovery.

The Cole case turned on the absence of discovery.

The Gwillim case determined that no third person could have the benefit of the locator's discovery for the purposes of location adverse to the first locator except such third person be a relocator after the first locator had lost or abandoned his rights.

The case of *Swanson v. Sears* in which this Court affirmed the decision in *Swanson v. Kettler* in the Supreme Court of Idaho, involved the question of abandonment by a senior locator before the expiration of a

statutory period for performing labor so as to permit a relocation by a third person; the holding being that any attempt to initiate rights by a third person in a valid and subsisting mining claim is absolutely void.

The Little Gunnell case turned on the necessity of a relocator doing everything required by statute such as posting notice, fixing boundaries, and sinking shaft, before resumption of work by the original owner.

The Honaker case decided that the attempted resumption of work there before the court was not in good faith.

The act of July 2, 1898, c. 563, 30 Stat. 651, cited on page 27 of Petitioner's brief, postponed the doing of assessment work by soldiers in the Spanish-American war. The language of Section 1 of this act is not that the claims therein mentioned are "forfeited" for nonperformance of annual assessments, but simply "subject to forfeiture."

It is manifest that the expressions in the above decisions, quoted by Petitioner, were used incidentally. In none of these cases is there the slightest intimation of any intention to contradict or modify the rule as to the effect of failure in assessment work as declared in *Belk v. Meagher.*

Petitioner also lays great stress upon three decisions of the Department, *E. C. Kinney,* 44 L. D. 580; *Interstate Oil Corporation and Frank O. Chittenden,* 50 L. D. 262, and *Cronberg v. Hazlett,* 51 L. D. 101. E. C. Kinney, decided in 1916, concerned a mining claim as to which claimant was in default in the performance

of annual assessment work at the date of a withdrawal for the construction of irrigation works under the reclamation act and it was held that the claim, being in default at such date, was not excepted from the force and effect of the withdrawal. The Interstate and the Cronberg cases differ from the Spad case in the following particulars:

1. In the Interstate and Cronberg cases there had been no resumption of work by the locator, while in the Spad case there is no question as to the performance of the 1921 assessment work on the claim itself.

2. In the Interstate case abandonment was found, and in the Cronberg case lack of discovery; neither of which elements are present in the Spad case.

3. The Interstate and Cronberg cases were cases between rival claimants, to-wit: locators claiming under the general mining laws and lessees or permittees claiming under the Leasing Act; while in the Spad case the rights of third persons are in no wise involved, so the right to resume work is entirely clear.

4. By construing the Interstate and Cronberg decisions in the light of the facts in those cases those decisions are seen to harmonize with the earlier decisions on assessment work; but if those two decisions are to be taken as precedents for the rejection of the Spad claim, then they are hopelessly out of line with the earlier rulings on the subject.

It is clear that none of said three departmental decisions approach the instant case.

On page 21 of Petitioner's brief there is quoted

from the brief of this Respondent in the court below, the statement there made that the mere nonperformance of assessment work within the assessment year does not in and of itself have any effect whatsoever upon the mining claim on which such default in annual labor is made, but, on the contrary, such mining claim continues in all its original vigor up to the instant of relocation by a third party. We base this statement upon the case of *Belk v. Meagher,* and the other cases from which we have quoted heretofore in this brief. No other reasonable conclusion can be drawn from the language of Chief Justice Waite quoted from *Belk v. Meagher* (page 282):

> "As we think, the *exclusive possessory rights* of the original locator and his assigns *were continued,* without any work at all, *until Jan.* 1, 1875, *and afterwards* if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law." (Italics ours.)

The Petitioner's first contention is for an *ipso facto* forfeiture of a mining claim in default in annual assessment work at the end of an assessment period. This contention, as we have now demonstrated, is contrary to the settled construction of Section 2324 of the Revised Statutes for over half a century.

Petitioner's second contention is that the provision in Section 2324 for resumption of work by an owner upon his claim after default, with the resulting removal of the possibility of the loss of said claim by the acquisition of rights therein by third persons during

the period of default, was impliedly repealed by Section 37 of the Leasing Act.

Such contentions are absolutely contrary to the language which Congress has employed to express its will. That language is that valid claims may be "maintained in compliance with the laws under which initiated." There is nothing in this language to show any intent on the part of Congress to repeal any portion of the old mining laws under which the claim in question was located. No additional burdens in the maintenance of his claim are placed by Section 37 of the Leasing Act upon the owner of such claim. No benefit, privilege or right which the owner of a mining claim enjoyed under the old laws is taken away by Section 37 of the Leasing Act, or even attempted to be taken away by said section.

If an attempt had been made to take away any of such rights there would be presented the fundamental question of the constitutional power of Congress to take away such rights. No such question is here presented because no such attempt has been made. The rights of an owner of a mining claim located under the old mining laws are preserved in their entirety. Congress must be held to have appreciated all of the benefits, privileges and rights which the owners of mining claims possessed under the prior laws, and to have intended the owners of mining claims located under such prior laws to continue to enjoy each thereof.

The Secretary has attempted to preserve all of the *burdens* placed upon the owner of a mining claim by Section 2324, and, at the same time, to take away from

such owner the benefit of the right of resumption conferred by said section. Such a construction of Section 37 of the Leasing Act is impossible.

There have been instances when Congress did not intend to permit the right of resumption of work; but when Congress so intended, express provision to that effect was made. An instance is the Act of March 2, 1907, c. 2559, 34 Stat. 1243, which amended the laws governing labor or improvements upon mining claims in Alaska. This last mentioned act provides for at least $100 worth of labor to be performed, or improvements to be made, on or for the benefit of every mining claim in the District of Alaska during each year, and for the filing of an affidavit showing the performance of such labor or the making of such improvements containing certain specified statements. The act then further provides:

> "And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim *shall become forfeited* and open to location by others as if no location of the same had ever been made."

This act was construed in the case of *Thatcher v. Brown*, 190 Fed. 708 (710). The court quotes the special act above quoted, and also Section 2324 of the Revised Statutes, and says:

> "It will be seen that by both the acts above quoted the annual assessment work is required to be done 'during' the year. But by the former act a failure to complete such work within the year

while rendering the ground open to relocation, was not declared to work a forfeiture of the locator's rights; on the contrary, he, together with his heirs, assigns or legal representatives, was expressly given the right to resume work upon the claim after such failure to complete it, provided no other location be made in the meantime. By its act of March 2, 1907, however, Congress, while conferring upon locators in Alaska a privilege not given by Section 2324 of the Revised Statutes, to-wit, a provision permitting Alaskan locators to file for record an affidavit showing the performance of the required annual assessment work, which affidavit should be prima facie evidence of such performance, expressly declared that, upon the failure of the locator or owner of any such claim in Alaska to comply with the provisions of the act as to the performance of work and improvements, 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.' "

"Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's rights; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the latter one."

The right of resumption of work is a valuable right in the owner of a mining claim. A stranger attempting to relocate a claim must perform all of the initial requirements conditions precedent to a location, with the exception of making a new discovery. He must mark the boundaries of the claim, post and record notice. The owner in resuming work upon his claim need do none of these things. He grasps his pick from the ground where he dropped it and resumes his work at the point where he left it. The effect of such resumption of work is to continue the estate of the owner in all its original vigor.

This right of resumption of work given to the owner of a mining claim by Section 2324 was neither expressly nor impliedly attempted to be taken away from such owner by the Leasing Act. On the contrary, the provision of Section 37 of the act that valid claims "thereafter maintained in compliance with the laws under which initiated" may be perfected, preserves to the owners of such claims every right theretofore enjoyed under Section 2324 of the Revised Statutes, one of the most important of which, as the language in *Thatcher v. Brown, supra,* points out, is the right to resume work after default in assessment labor. Such resumption of work removes the possibility of forfeiture, and in the language of *Knutson v. Fredlund, supra,* "it does not restore a lost estate."

Petitioner urges the inapplicability to the instant case of the decisions in *Belk v. Meagher,* and the other cases following that decision from which we have quoted in earlier portions of this brief, on the ground that

all of those cases dealt with rights between rival locators and not with rights between a locator and the Government. The Secretary concedes that, prior to the passage of the Leasing Act, the Government had no concern with the performance or the nonperformance of annual labor. But he contends that the Leasing Act has invested the Government with the character of a rival locator, and that immediately upon the expiration of an assessment year, with annual labor in default, the land covered by the claim on which such default has occurred becomes a part of the public domain, without any act on the part of the Government.

Manifestly no support for these contentions can be found in the language of the exception in Section 37 of the Leasing Act. Such contentions are, therefore, attempted to be justified on the supposed policy and purpose of the Leasing Act.

As we have heretofore pointed out, however, the policy or purpose of the Leasing Act cannot in any wise affect claims excepted from its operation. Such claims must be scrutinized in the light of the policy and purpose of the old mining laws under which such claims were initiated. And such policy and purpose of the old mining laws were to encourage the development of the mineral resources of the country by extending privileges to the persons who undertook such development. Admittedly, under such prior laws, the Government had no interest in annual labor.

On page 23 of Petitioner's brief the following language is quoted from *Belk v. Meagher, supra* (page 284):

"On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry."

Petitioner states that this language was spoken as to the character of a locator's rights *prior* to the occurrence of a default. This is an error. The claim involved in the case of *Belk v. Meagher* became in default on January 1, 1875, and continued in default until the resumption of work thereon by the original locators in June, 1875. The 19th of December mentioned in the above quotation is December 19, 1876, the date of Belk's attempted location. The above quoted language from the decision shows that the property embraced in a mining claim is just as much withdrawn from the public domain after default and resumption of work as is the fee by a valid grant from the United States. There is nothing in the Leasing Act to change this fixed construction of the effect of default and resumption of work under the prior laws so far as claims located under the prior laws are concerned.

Under the old mining laws a mining claim does not terminate *ipso facto* upon the expiration of an assessment year with annual labor in default. Resumption of work by the locator upon his claim before the initiation of any rights therein during the period of default preserves the locator's rights in their full vigor both as against the Government and as against any third

person. The passage of the Leasing Act has not changed this condition.

(c) ABANDONMENT AND FORFEITURE DISTINGUISHED.

In many of the cases cited in the brief of Petitioner the courts have failed to distinguish between forfeiture and abandonment. Many of such cases were decided on the assumption that an abandonment had taken place. This failure to distinguish between forfeiture and abandonment has necessarily led to a confusion of ideas.

> "Abandonment operates *instanter*. Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain. It is then *publici juris* and open to location by the first comer. Forfeiture does not occur until some one else enters with intent to relocate the property. Abandonment may occur at any time, even after full compliance with the law as to performance of annual labor. Forfeiture will only ensue upon the lapse of the statutory period, upon failure to represent the claim, *and* upon entry and location by another." Lindley on Mines, 3d Ed., Vol. 2, Section 643, pages 1597-1598, and cases there cited. (Italics ours.)

In abandoning his claim the owner abandons all of his interest in such claim and all of the rights possessed by him as such owner. He abandons the right to resume work on his claim. Immediately upon aban-

donment the land covered by the claim becomes a part of the public domain.

But no claim is abandoned when the owner simply allows his assessment work to become in default, without any intention of abandoning his claim, but with the intention of exercising his right to resume assessment work on such claim at a later date. Assessment work may be in default, yet if the owner has no intention of abandoning his claim, such claim does not become public domain or *publici juris,* but the owner's estate in his claim continues, subject to be divested, but only and strictly within the provisions of Section 2324 of the Revised Statutes. Such a divesting of the owner of his estate would be a forfeiture.

The distinction between abandonment and forfeiture is clearly stated in the case of *Justice Mining Company v. Barclay,* 82 Fed. 554, 559, where Judge Hawley held that although the owner of a mining claim had failed to do his assessment work within the prescribed time, so that the claim was subject to relocation, yet if before any such relocation by another he resumed work, any attempted subsequent locations were invalid. Judge Hawley says:

> "It is a well-settled principle of law that abandonment of property is always a question of intention. It is a voluntary act. The property in question was never abandoned by complainant. It always asserted a claim to the ground. There is no evidence in the record which indicates any intention on its part to give up its right to this particular ground. Forfeiture may occur by failure to comply with some positive requirement of the

> statute, or of the mining rules or regulations, if the statute or rules provide that such failure shall work a forfeiture of the claim. Forfeitures, however, are not, as a general rule, favored by law. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law. *Hammer v. Milling Co.,* 130 U. S. 291, 301, 9 Sup. Ct. 548."

The facts in the case at bar completely negative any abandonment of Spad No. 3 claim. Work was done in the fall of 1920 upon Spad claims 4, 5 and 6. The value of this work was in excess of $600.00. Affidavits of annual labor embracing all of the claims in the group were filed in the late fall of 1920 in accordance with the provisions of the Colorado statute upon the subject. If there had been any intention to abandon Spad claims 1, 2 and 3, on which no assessment work was done for the assessment year 1920, the locators would not have put upwards of $650.00 worth of assessment work on Spad claims 4, 5 and 6 when assessment work to the amount of $100 for each of those claims or $300 worth of assessment work would have been sufficient to hold those particular claims; or have filed the affidavits of labor as to claims 1, 2 and 3, under the provisions of the Colorado statutes. The fact that the complete assessment work was done on each of the claims in each succeeding year negatives any intention at any time to abandon any one of the six claims in the group. The claim here in question was never abandoned.

(d) FUNCTION OF ASSESSMENT WORK SINCE LEASING ACT.

It is urged in the brief of Petitioner that, with the danger of relocation removed, the owner of an oil shale placer claim existent at the date of the passage of the Leasing Act need never do any more assessment work upon such claim but may hold the claim indefinitely unless it terminated *ipso facto* on his default.

Even if the result suggested did follow from a proper construction of the Leasing Act and the mining laws, we submit that such result could not be avoided by destroying vested rights in violation of the provisions of the Constitution of the United States.

But the Leasing Act has not so removed the necessity of assessment work on the part of the owners of mining claims, covering the mineral substances embraced in the act. If assessment work is not done within the assessment year, then, at any time while such work continues to be in default and before resumption of work by the owner, various proceedings may be begun having for their object the termination of the estate of the owner in such claim, as follows:

First, any third person who wishes to obtain a lease in accordance with the provisions of the Leasing Act to the particular ground embraced within the limits of a mining claim, the assessment work upon which is in default, may, at any time while such default continues and before the resumption of work upon his claim by the owner, make application for a lease. Such application at once raises the question as to the validity of the claim. In such a proceeding the Department of

the Interior has full power, if the facts so warrant, to declare the termination of the mining claim and issue the lease.

Again, any citizen may locate the ground covered by the claim for gold, silver, cinnabar, or other mineral substances not covered by the Leasing Act. The question of the validity of the existing oil shale location would at once be presented for determination.

Again, the questin may likewise be raised by and determined at the instance of a third person who has initiated rights under laws other than the mining laws to the ground embraced in the mining claim. This is true because Section 37 of the Leasing Act provides the exclusive method of disposition only of the mineral deposits therein named, and does not prohibit surface agricultural entries.

It is thus apparent that the assumed condition wherein an owner can hold a mining claim indefinitely, without doing assessment work, is not created by the Leasing Act. The owner of a mining claim may have and enjoy every right and privilege which he had and enjoyed under the mining laws in compliance with which he initiated his claim, but if he fails to do his annual assessment work he is still liable to lose his claim as the result of proceedings begun during the period within which his default continues. The Leasing Act takes away none of the rights of locators of claims for minerals other than those described in the Leasing Act, nor the rights of surface entrymen; and it adds another class of possible adverse claimants, to-wit: applicants for leases on the minerals covered by the Act.

No steps were taken by the Government or by any third person in the interval, between the expiration of the 1920 assessment year and the resumption of work on the claim itself in the year 1921, to have a forfeiture of the claim declared on the ground of the alleged insufficiency of the 1920 assessment work. Therefore, the resumption of work removed the possibility of forfeiture.

When the Leasing Act went into effect on February 25, 1920, the claim in question was a valid existent claim expressly excepted from the operation of the act by the language of the act itself. Consequently, even though the act at the moment of its passage, had the effect of withdrawing from entry under the general mining laws all lands covered by claims theretofore abandoned, it had no effect whatsoever upon the claim involved in this case. The act, itself, could not be a location or a relocation of the claim to take effect in the future if the owner of the claim should fail to do his assessment work. As stated in *Belk v. Meagher,* 104 U. S. 279 (285), "A location to be effectual must be good at the time it is made."

After the passage of the Leasing Act the owner of the claim had the right to maintain his claim and to perfect it under the same conditions as before. His annual assessment work might become in default, but his estate in his claim would not be lost or terminated merely by reason thereof. He had the right to resume work and preserve his estate at any time before his claim was "relocated," that is, before the taking of

affirmative steps to initiate proceedings in which his claim might be declared forfeited.

The mere existence of the Leasing Act did not constitute the initiation of any such proceedings. After its passage, as before, affirmative steps had to be taken during the continuance of the default to terminate the claim. Such steps, however, would necessarily have to be authorized and limited by the provisions of the mining laws under which the claim had been initiated and was being maintained. Under such laws, in the absence of a relocation or its equivalent, the owner's estate in a mining claim continued even after default in annual assessment work, and the owner could completely prevent any forfeiture, based on such default, by resuming work on his claim before affirmative steps taken. The Leasing Act no more constituted such an affirmative step than would the resolution in the mind of a third person to relocate a claim in default not followed up by a single overt act. A person might know of mining claims in a mining district which were in default in the matter of annual assessment work. He might have walked over such claims at some prior date and have seen the mineral thereon. He might declare that he made up his mind to relocate all of the claims in the district so in default, but such general declaration would avail him nothing if not followed up by actual entry upon particular claims and the posting of notice of his location on such particular claims during the continuance of the default. (*Deeney v. Milling Co.*, 11 N. M. 279.)

In the case at bar the owner resumed work upon

his claim in 1921, without any overt act, to have the claim forfeited, having been done in the interval between the expiration of the 1920 assessment year and the date when such work was resumed. He thereby preserved his estate and destroyed the possibility that it might be terminated, because of alleged insufficiency in the 1920 assessment work which he had done for the benefit of the claim.

On page 39 of his brief Petitioner refers to the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken and to resume possession of lands that have been forfeited. But in the absence of some appropriate judicial action there must be some appropriate legislative action before the forfeiture is accomplished. In *Spokane, etc., Ry. v. Wash. and Gt. Nor. Ry.*, 219 U. S. 166, 174, where the question of the forfeiture of a grant of right of way was before the Court, this Court said:

> "Reading this grant in the light of the former adjudications of this court, we think it must be held that it was the intention of Congress that the grantee should perform these conditions after acquiring title and taking possession, and therefore that the conditions were subsequent. This being true, there could be no forfeiture on the part of the United States without some appropriate judicial or legislative action, which it is not claimed was taken in this case."

What the legislative action required must be is clearly described in *St. Louis, etc., Railroad Co. v.*

McGee, 115 U. S. 469, 474, where this Court, speaking through Chief Justice Waite, said:

> "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

The construction of the Leasing Act contended for by the Secretary would allow the Government to play fast and loose with its citizens. An owner might do his assessment work in good faith year after year, as the owner did in the case at bar, without remonstrance by or upon the part of the Government, thus investing hundreds of dollars in assessment and patent work. When he had completed the required patent work, he would apply for patent, only to be told that, while he had in fact done the required amount of patent work, yet he had lost his claim many years before because, in a particular year, the assessment work which he did, in the opinion of the inspector reporting upon the patent application, was a few dollars less than $100 worth, or was not work of the character which the inspector would have done had he been doing it. If permitted to retake the claim, as improved by the work of the owner under such conditions, the Government would be taking property in direct violation of the provisions of the Constitution of the United States. An individual would be estopped to do this; and the Govern-

ment ought not to claim rights which would be inequitable in an individual.

The Secretary urges that to hold that the right of resumption of work was not taken away by the Leasing Act would render difficult the administration of said act. But the property of citizens cannot be confiscated in order to avoid inconveniences to the Land Department.

Since early in 1920 the Government has had many inspectors constantly in the field. Immediately upon the expiration of any assessment year, if any one of these inspectors had been of the opinion that a claim was in default in the matter of assessment work, such inspector could have filed a protest, and the Government, if entitled to a forfeiture, could have had such forfeiture declared. Having permitted the owner to resume work upon his claim, without having taken any action within the period when the alleged default existed, the Government has lost any opportunity of taking advantage of such alleged default; and the owner has preserved his claim under the provisions of the mining laws, and is entitled to the express provision of the Leasing Act that such "claims may be perfected" under the prior laws. Such a construction of the Leasing Act permits it to stand, side by side, with the general mining laws and allows full force and effect to be given to both. Any other attempted construction is unconstitutional and unwarranted.

The case before the Court falls into that class of cases where the courts must perform one of their most important functions, viz: the preservation of the rights

of the individual in times of changes in governmental policy.

The policy of the mining law of 1872 was to encourage the development of the mineral resources of the country. The policy of the Leasing Act of 1920 was to conserve the mineral resources and to provide a revenue therefrom. Such a sweeping change in the fundamental policy of the United States naturally called for careful adjustments to prevent injury being done to the individual. The records of Congress concerning the debates leading up to the adoption of the Leasing Act show that the Senators and Members of Congress from the mining states were properly solicitous in regard to the effect which the proposed change in policy would have on individual rights. After much consideration Congress devised the happy expedient of keeping alive the old mining laws as to existing claims.

The plan for keeping alive the old mining laws as to existing claims was embodied in Section 37 of the Leasing Act. The important words to be borne in mind in considering this section are "maintained" and "perfected." Obviously "maintained" refers to Section 2324 Revised Statutes concerning assessment work; and "perfected" refers to Section 2325 Revised Statutes concerning the procedure for obtaining patents. It is, therefore, these two sections that provide the chart of procedure as to the existing mining claims.

Section 2325 contains no provision as to assessment work. The provisions of Section 2324 are that assessment work shall be performed with a certain penalty for non-performance. This penalty is the chance of

the loss of the claim if rights of others intervene during the period of default. The courts, for half a century prior to the adoption of the Leasing Act, had been construing Section 2324; and Congress must have been content with such construction because Section 37 of the Leasing Act contains no words attempting to change such construction. Under such construction, the locator had the right of resumption of work and curing his default before the rights of another intervened.

All that the respondent is contending for in this case is that his rights shall be measured by Section 2324, as thus construed by the courts. The Secretary would contend that a portion of Section 2324 (the part requiring assessment work) is still in full force; and that another portion (that part permitting resumption of labor) has been repealed. His only argument in favor of his contention is the argument of policy in that he insists that otherwise a miner could hold his claim indefinitely without assessment work. Such an argument, even if sound, could not deprive a miner of his vested rights. But we have shown that this argument of policy is not even sound because there are many ways (surface homesteads, applications for oil shale leases, etc.) in which the rights of others may attach to the lands during the period of default and before resumption of work.

Respondent, therefore, comes before this Honorable Court confidently relying upon Section 2324 Revised Statutes—not upon a part of said section, but

upon the whole section, including the right of resumption of work.

CONCLUSION

The Secretary erred in matters of law. The courts have jurisdiction to compel the Secretary by mandamus to issue the patent to Respondent in this case. The judgment of the Court of Appeals should be affirmed.

CHARLES S. THOMAS,
CHESTER I. LONG,
MALCOLM LINDSEY,
LANGDON H. LARWILL,
GEORGE K. THOMAS,
PETER Q. NYCE,
Attorneys for Respondent.

FILE COPY

DEC 2 1929
CHARLES ELMORE CROPLEY
CLERK

No. 63

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1929

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

EMIL L. KRUSHNIC, RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SPECIAL BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

EMIL L. KRUSHNIC, RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT KRUSHNIC

Other counsel for respondent have exhausted the subject, leaving me the needless task of reiteration. Hence I am reluctant to supplement their arguments by restating their contentions, perhaps less effectively.

But, inasmuch as I had some part in framing the Leasing Act of 1920 and have been fairly familiar with controversies attending its administration, I venture, at the instance of the interests which I represent, to submit a few brief supplemental observations with all possible brevity.

The case must turn upon the question whether it is governed by the provisions of the Mining Act of 1872, or those of the Leasing Act of 1920, or both of them as the Department contends. The court below very properly decided that the Mining Act of 1872, under which the respondent's claim was located and a patent applied for, is alone applicable to it. Hence the Leasing Act does not and cannot affect it. If this be true, of which I submit there is no doubt, the judgment of that Court must stand.

I

NO REPEAL OF THE OLDER STATUTE

The Leasing Act does not repeal the Mining Code of 1872 with its amendments, either directly or indirectly. It restricts its operation by withdrawing certain enumerated mineral deposits within the Public Domain from the list of those theretofore subject to discovery and location under it. These are no longer available to private acquisition but are made "subject to disposition only" as in the Leasing Act provided, "Except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Claims embraced within this exception, of which the Krushnic location is one, were thus deliberately excluded from the Act. They remained unaffected by it. Their status was the same after as before its enactment. Hence they

must be enjoyed, developed and patented precisely as though no Leasing Act had been passed. They possess all the privileges and are subject to all the burdens pertaining to other "valid claims" containing gold, silver, copper or other metalliferous deposits. All this the Department concedes, but it contends that inasmuch as the "valid claims" excepted from the Act cannot be relocated by other citizens in the event the owner defaults in his annual assessment work, he must literally comply with that duty or lose his property by operation of law. This contention has but an implication to sustain it, and the implication has in turn no basis in logic, or in the law.

Were it necessary to do so it could be easily maintained that since the premises contained within the boundaries of these excepted claims were never covered by the Leasing Act, they are open, in case of default in assessment work, to relocation as other claims are and always have been. But it is not important here.

It suffices to assert that, assuming our contention to be sound, the Leasing Act is wholly foreign to the discussion. The application for patent was made under the older law, and could not have been made otherwise. The owner has taken every step required for securing it. His patent is then denied him, because an assumed disregard, not of another statute, but of a strained construction placed upon it by the Secretary of the Interior, has forfeited his title. And this, albeit other valid claims unrelated to

oil, gas or coal held under the same law, are exempt from such arbitrary confiscation.

If the ruling of the Honorable Secretary be sound it must follow that valid claims covered by the statutory exception become *eo ipso* forfeit to the Government upon the failure of the owner to perform all of his assessment work within the limits of any preceding year, although he may have performed it later, together with that of several succeeding years, without notice that the claim had been quietly reabsorbed into the Public Domain. This group of claims is thus made a separate class by Departmental Edict, whose owners are denied one of the most important privileges of the Act of 1872 as judicially interpreted for nearly sixty years. They are made subject to forfeiture by operation of law, without notice or inquiry; a doctrine wholly alien to our jurisprudence and repugnant alike to law and morals. In effect the Department applies the Alaska statute to the delinquent claimant instead of Sec. 2324 R. S.

FORFEITURES OBNOXIOUS TO THE MINING CODE

The Mining Code is entitled "An Act to Promote the Development of the Mining Resources of the United States." It encouraged the citizen to avail himself of the opportunity to explore the Public Domain for valuable deposits and appropriate them when found. This policy from the beginning to 1904 was the outstanding feature of all the Federal [illegible] Laws. The Leasing

Act embodies the opposite of that policy. But it makes no provision for arbitrary forfeitures.

The term has long been thoughtlessly confused with abandonment; which is an entirely different matter. Forfeitures are penalties and therefore odious. They are never presumed. They are never enforced save as a last unavoidable resort, after full hearing. *Per contra,* abandonment rests upon intention. It is the result of conduct, either positive or negative. The relocation of a delinquent claim under Sec. 2324 R. S. presumes abandonment. So also is the non-assertion of property rights for a period of time inconsistent with the right of continued ownership and possession. Neither of these conditions is akin to forfeiture. The former presumes the owner's acquiescence; the latter is the offspring of trial and decree.

DEPARTMENT NO JURISDICTION OVER ASSESSMENTS

The statutory requirement of annual expenditure on or for the benefit of unpatented claims never concerned the Interior Department. Section 55 of the General Land Office Rules, adopted in 1872 and still in operation, provides that "the annual expenditure of $100 in labor or improvements on a mining claim required by Section 2324 . . . is solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession, the determination of which is committed exclusively to the courts."

A head note to the last print of these rules in-

forms us that because of more recent enactments, the regulation is not applicable to potash, oil, etc., "except as to valid claims existent at date of such repeal and thereafter duly maintained pursuant to the laws under which located," thus incorporating into the amended rule the statutory exception.

The Krushnic claim is thus again carved from the rule as amended, and is therefore not in the least affected by it. It serves to reemphasize the older declaration that the Department has no concern with annual assessments. It is beyond question, therefore, that the Secretary has no power to predicate a forfeiture upon a delinquent assessment, especially after the delinquency has been cured. It has not and never had any jurisdiction over the subject.

BASIS OF DEPARTMENTAL ACTION

This is the assumption that a delinquent shale oil mining claim is no longer subject to relocation. Why not? The Leasing Act does not sustain the assertion, but refutes it. Certainly that Act cannot be made to include land expressly excepted from its provisions. The Government is, of course, the dominant owner before patent; but that is true of all mining claims held in possession. They do not so revert to it. On the contrary they become "subject to relocation" by some other citizen. With all possible respect to the Interior Department, its assumption is not construction, but a perversion of the law.

It has been urged that if forfeiture does not

follow delinquency the claim owner may disregard the statutory requirement year after year with impunity. He may also decline to apply for patent for that is discretionary. This is no novelty. It has been true of all claims ever since the Mining Act was approved. But there are too many potential relocators around to make such conduct possible. In any case the situation outlined calls for legislative relief if any be needed. The Department cannot change the law to comply with its views, whether sound or otherwise.

The Annual Assessment Clause embodied in Sec. 2324 was inserted by the House Committee at the instance of Delegate Chaffee of Colorado. Its purpose was to require claim locators to show good faith by a minimum annual expenditure upon or for the improvement of every claim, inasmuch as the Bill placed no limitation upon the number which any citizen might decide to locate.

In the instant case, Krushnic actually made his expenditure for 1920, and also for the succeeding years. The Department, however, on examining his patent application, three years afterwards decided that the expenditure did not benefit the claim, hence it was never made in law. It therefore promptly kicked Krushnic into the street, and retained his property for Uncle Sam. Let us hope this is the first and will be the last instance of the sort.

LEGISLATIVE HISTORY

Section 37 of the Leasing Act was Section 36

of the Senate Bill, and was the subject of debate in that body on August 30, 1919. It began with the reading by Senator Jones of New Mexico, of many letters and telegrams from owners of oil claims in that State protesting against the bill unless the validity of their locations was affirmed and safeguarded. Senator Smoot in charge of the Bill asserted that the subject was fully covered by the proviso in Section 36, which he read into the record but which was finally amended by adding to it the words: "including discovery." He said further that the phrase: "except as to valid locations" originally used, had been changed to "valid claims" in deference to a recent decision of the U. S. Circuit Court of Appeals, and closed with the assurance that if the constituents of the Senator from New Mexico had complied with legal requirements in making their locations and continued to do so, the proviso of Section 36 afforded them ample protection.

Senator Lenroot, quoting from President Taft's withdrawal order of September 27th, 1909, that "all locations or claims existing and valid on this date may proceed to entry in the usual maner," asserted that under it *bona fide* claimants were fully protected from loss or injury and could proceed to patent as though the order had not been issued. That right, he said, had recently been judicially affirmed in the case of the United States vs. Consolidated Mutual Oil Company. He emphasized his assertion by declaring that, had the court decided otherwise,

the exception would have been meaningless, that it could not apply to a completed location, and that no patent was needed to safeguard a discoverer's vested right.

Senator Smoot then suggested the addition of the words "by discovery" at the end of the exception. Senator Jones proposed to substitute the word "including" for the word "by." This was accepted, thus closing the incident. See Congressional Record, Vol. 56, Part 5, pages 4577: 4582, inclusive. The House adopted the proviso as amended by the Senate without discussion.

Although not controlling, this debate should be persuasive. The purpose of the Senate was clear. It was concerned with the phraseology of the exception, and accepted it only after satisfying itself that the object desired had been fully attained. Having taken part in framing and passing the bill, I can confidently affirm that if the attitude of the Interior Department concerning the effect of delinquency in annual assessments had been even remotely anticipated, the exception would either have been more emphatic or the bill would have failed of passage.

SPIRIT OF THE LAW

The Mining Law of 1872 was prompted by the need for developing the Mineral Domain. The sole way to accomplish this was to reward the discoverer with the fruit of his discovery. The Government found its compensation in the resulting increase of wealth and prosperity, while

the acreage passing into private ownership became subject to local taxation. No obstacle was placed in the way of the citizen availing himself of the provisions of the law. Good faith alone was required of him, evidenced by his due observance of statutory requirements. The Government policy was one of encouragement to the individual, and it was under this act and in accord with that policy that the claim here involved was located, purchased and held.

Only by compliance with that Act can the title to such claims be perfected. They are excluded by express terms from the dominion of the Leasing Act, and in my judgment would have remained outside of it, had the proviso to Sec. 37 been omitted from it. The spirit of the Mining Act was neither destroyed nor impaired as to the valid mining claims existing under it on February 25th, 1920. It is as virile when invoked by their owners, as though they were claims containing gold or other metallic substances. Two conflicting rules applicable to claims located and held under the same law cannot coexist, merely because one yields oil and the other copper. No forfeiture under the law of their common origin can be invoked against the one which cannot under the same circumstances be invoked against the other.

HODGSON V. MIDWEST OIL CO.

This case reported in 17 Federal (new) 71, involving the question here at issue, is the only one in existence which sustains the Petitioner's

view. But it is in conflict with every known decision directly involving the subject, with the Mining Act, and with rule 55 of the General Land Office.

It arose from an application of the Oil Company for a lease upon premises covered by a placer claim of older date. The Court of Appeals held the claim to be invalid because it did not affirmatively appear from the pleadings that the owner had performed the annual assessment work within the statutory period.

In reaching its conclusion the court says: "It is clear that such original locator and his assigns *was required as a condition subsequent* to do the so-called assessment work periodically, and upon failure to do so *all possessory rights terminated.* Ordinarily and in the absence of any withdrawal the locator *would have the right to relocate,* equally only, however, to any other person qualified to locate."

Again: "It is well settled that a failure to do the work or have an adequate legal excuse *automatically terminates* the locator's right of possession." (Italics mine.)

The conclusion is postulated entirely upon these assumptions, both of which are in hopeless conflict with the settled law of the subject. Not a solitary authority, judicial or departmental, can be found to sustain it. No text writer ever announced such a doctrine. If it is the law every previous pronouncement of it was wrong. The unbroken course of the de-

cisions upon the subject have been here swept aside or disregarded, with nothing more than a casual reference to any of them.

Never before was it held that a delinquent locator can only resume work upon his claim by relocating it. Never was it held such a claim required relocation when work upon it was resumed. Such resumption "prior to the inception of an intervening right prevents forfeiture. It does not restore a lost estate." Kuntsen v. Friedland cited in principal brief.

Never before was it decided that failure to do the assessment work within the statutory period "automatically" or otherwise "terminates the locators' rights of possession." Belk v. Meagher, 104 U. S. 279, affirmed by a host of other decisions of the Supreme Court expressly affirms the contrary to be the law. And the Interior Department has for fifty-seven years officially declared the subject to be solely a matter between rival or adverse claimants to the same land.

Nor have the premises in question ever been withdrawn from exploration and purchase as the Circuit Court assumes. Sec. 37 of the Leasing Act in terms declares to the contrary. And it is obvious that Congress cannot by an act of withdrawal or otherwise destroy or impair the vested right of any citizen acquired in the Public Domain under and in compliance with the Public Laws.

I am entirely within the bounds of propriety when I affirm that so far as I am aware no mod-

ern decision has been so unmindful of prevailing and long established law, so indifferent to vested rights in the mineral domain which Congress has been at great pains to conserve, or so destructive in its results if it should be recognized, as that of Hodgson v. Oil Company.

Since my employment in the instant case I have carefully reviewed previous decisions upon the subject involved, in many of which I was counsel, and I can only account for the Hodgson opinion upon the theory that the court like the Department assumed the premises involved had been withdrawn from the operation of the Mining Act. It contains an intimation to that effect, which is, of course, unwarranted.

INTERESTS INVOLVED

Acting upon the advice of experienced counsel familiar with the laws of mining, many citizens and corporations have in good faith purchased from their locators many shale oil claims and have expended large sums in their development. The present attitude of the Interior Department could not have been foreseen. They were entirely justified in accepting the assurance of counsel that the title they acquired to these claims was sound, and protected by the letter and spirit of existing laws. Some of these purchases were made over six years ago, during which time the purchasers have been in undisputed possession. Some of their annual expenditures may, as in the case here, be hereafter declared unbeneficial to the claims,

in which event they would lose them, however much they may have subsequently expended upon them. Surely even if the Government's right to enforce forfeiture is concealed in Sec. 37 of the Leasing Act, it cannot acquiesce in prevailing conditions for years and then launch the penalty retrospectively without regard to its destructive consequences.

Such a policy is one of confiscation. It shocks our normal conceptions of justice and ignores all constitutional safeguards designed for the protection of private property.

I have neither cited or quoted extensively from precedents supporting the views here expressed. They have been supplied in abundance by my associates, not to mention the opinion of the District Court of Appeals here appealed from. My purpose has been to submit a brief and simple outline of the merits of the respondent's case as I understand them. The opinion appealed from expresses in a single sentence the respondent's point of view:

"It would require a stretch of the imagination to hold that under this existing policy it was intended by Congress that the Government through its Secretary of the Interior might assume the functions of a relocator and enforce the forfeiture of the locator and dispossess him of his claim."

Respectfully submitted,

/ C. S. THOMAS,
for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1929.

Ray Lyman Wilbur, as Secretary of the Interior, Petitioner, *vs.* United States on Relation of Emil L. Krushnic.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 6, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

The disposition of this case depends upon the construction and application of § 2324, R. S. (U. S. C. Title 30, § 28), and the effect upon its provisions of § 37 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C. Title 30, § 193). Section 2324, R. S., which has its origin in § 5 of the Mining Act of 1872 (c. 152, 17 Stat. 91, 92), provides:

"On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

By § 2325, R. S. (U. S. C. Title 30, § 29), provision is made for issuing patents for claims located under the mining laws. One of the prerequisites, and the only one in respect of labor, is that the claimant must show "that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors."

The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only

to lease. But § 37 (U. S. C. Title 30, § 193) contains a saving clause protecting "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated," and declaring that they "may be perfected under such laws, including discovery."

On October 1, 1919, respondent and seven associates, all qualified under the law, located a tract of land in Garfield County, Colorado, under the name of Spad No. 3 placer claim. The land contained valuable deposits of oil shale and was open to appropriation under the mining laws of the United States. Spad No. 3 placer claim formed one of a group of six oil placer claims, numbered Spad No. 1, 2, 3, 4, 5 and 6 respectively, all located and owned by the same persons, and lying adjacent to each other. The assessment year 1920, by act of Congress, was extended until July 1, 1921. Prior to that date, annual labor amounting in value, it was asserted, to more than $600 was performed on claims numbered 4, 5 and 6, with the intention that said labor should apply to the entire group.

Subsequently, respondent acquired the interest of his colocators in the Spad No. 3, and, during and for the assessment year 1921, performed thereon assessment labor of an admitted value of more than $100, and continued to perform labor and make improvements on the claim until the aggregate value exceeded $500. On September 25, 1922, he applied for a patent, and, having complied with the statutory requirements and paid the purchase price, obtained final receiver's receipt on December 16, 1922. No relocation of the claim was ever attempted, nor was the valid existence or maintenance of the claim ever challenged in anywise by the United States, or by anyone, prior to the issue of the receiver's receipt. Thereafter, a proceeding against the entry was instituted by the Commissioner of the General Land Office; and that officer, after consideration, held the claim null and void upon the sole ground of insufficient assessment labor for the year 1920. This holding was affirmed by the Secretary of the Interior.

In all the proceedings before the land officers and the Secretary, it was conceded, as it is here conceded, that the claim was valid and existent when the Leasing Act was passed; and that no reason existed, or now exists, for withholding a patent, save the alleged failure of assessment labor for the assessment year 1920.

The Secretary held that by such failure, all rights to the claim became extinguished and could not be saved or revived by a resumption of work.

Thereupon, respondent applied by petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary to issue a patent to the claim. After a hearing on rule to show cause, that court discharged the rule and dismissed the petition. Upon appeal this judgment was reversed by the Court of Appeals for the District. 30 F. (2d) 742.

Two questions are presented for determination: (1) Did the Leasing Act of 1920 have the effect of extinguishing the right of the locator, under § 2324, to save his claim under the original location by resuming work after failure to perform annual assessment labor? (2) Is the case a proper one for the writ of mandamus?

1. The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk* v. *Meagher,* 104 U. S. 279, 283; *Manuel* v. *Wulff,* 152 U. S. 505, 510-511; *Elder* v. *Wood,* 208 U. S. 226, 232; *Bradford* v. *Morrison,* 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United

States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. *P. Wolenberg et al.*, 29 L. D. 302, 304; *Nielson* v. *Champagne Mining and Milling Co.*, 29 L. D. 491, 493.

It being conceded that the Spad No. 3 "was a valid claim existent on February 25, 1920", the only question is whether, within the terms of the excepting clause of § 37, the claim was "thereafter maintained in compliance with the laws under which initiated." These words are plain and explicit, and we have only to expound them according to their obvious and natural sense.

It is not doubted that a claim initiated under § 2324, R. S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; for as this court said in *Belk* v. *Meagher, supra,* at page 283, "His rights after resumption were precisely what they would have been if no default [that is, no default in the doing of assessment labor] had occurred." Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is "maintained" no less than it is by performance of the annual assessment labor. Such resumption does not *restore* a *lost* estate—see *Knutson* v. *Fredlund,* 56 Wash. 634, 639; it *preserves* an *existing* estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.

2. While the decisions of this Court exhibit a reluctance to direct a writ of mandamus against an executive officer, they recognize the duty to do so by settled principles of law in some cases. *Lane* v. *Hoglund,* 244 U. S. 174, 181, and cases cited. In *Roberts, Treasurer,* v. *United States,* 176 U. S. 221, 231, referred to and quoted in the *Hoglund* case, this Court said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must

read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perfrom. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

See also *Ballinger* v. *Frost,* 216 U. S. 240, 250.

In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of § 2324, Revised Statutes of the United States. A writ in that form follows the precedent established by this Court in respect of the writ of injunction in *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228, 238, and *Payne* v. *New Mexico,* 255 U. S. 367, 373, as being better suited to the occasion than that indicated by the District Court of Appeals. As so modified the judgment of that court is

Affirmed.